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# CONFIRMATION HEARINGS FOR THE DEPARTMENT OF JUSTICE

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## HEARINGS BEFORE THE COMMITTEE ON THE JUDICIARY UNITED STATES SENATE ONE HUNDRED THIRD CONGRESS

FIRST SESSION

ON

THE NOMINATIONS OF

PHILIP BENJAMIN HEYMAN TO BE DEPUTY ATTORNEY GENERAL; WEBSTER L. HUBBELL TO BE ASSOCIATE ATTORNEY GENERAL; DREW S. DAYS III TO BE SOLICITOR GENERAL; ANNE K. BINGAMAN TO BE ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION; SHEILA FOSTER ANTHONY TO BE ASSISTANT ATTORNEY GENERAL FOR LEGISLATIVE AFFAIRS; FRANK W. HUNGER TO BE ASSISTANT ATTORNEY GENERAL FOR THE CIVIL DIVISION; WALTER DELLINGER TO BE ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL; ELEANOR ACHESON TO BE ASSISTANT ATTORNEY GENERAL, OFFICE OF POLICY DEVELOPMENT; DORIS M. MEISSNER TO BE COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE; JO ANN HARRIS TO BE ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION; AND EDUARDO GONZALEZ TO BE DIRECTOR OF THE U.S. MARSHALS SERVICE

MAY 18, 19, 20; JUNE 9, 16, 22; SEPTEMBER 30; AND OCTOBER 14, 1993

Serial No. J-103-12

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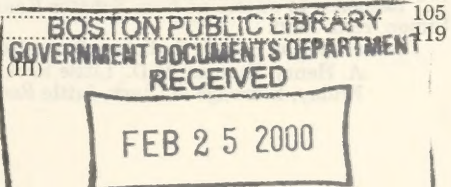
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# NOMINATION OF PHILIP BENJAMIN HEYMANN TO BE DEPUTY ATTORNEY GENERAL

TUESDAY, MAY 18, 1993

U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The committee met, pursuant to notice, at 10:10 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Joseph R. Biden, Jr. (chairman of the committee) presiding.

Also present: Senators Kennedy, Metzenbaum, DeConcini, Leahy, Simon, Kohl, Feinstein, Moseley-Braun, Hatch, Thurmond, Simpson, Grassley, Specter, Brown, Cohen, and Pressler.

## OPENING STATEMENT OF CHAIRMAN BIDEN

The CHAIRMAN. The hearing will come to order.

Before we begin today, I saw a headline in the newspaper that I found somewhat shocking, because I thought we Democrats were in the majority. It says, "Thurmond Takes Charge of Courts."

Then I went on with great relief to read that it was a story about Strom's son who has taken charge of the tennis courts as one of the top tennis players in the State of South Carolina. "Aiken Jr. leads Hornets to favorite role in the 4A tennis title." My congratulations to your son, Strom, and my relief that you are not taking charge of the courts and that it is your son. [Laughter.]

Quite a kid. Congratulations.

Ladies and gentlemen, we will begin the hearing in earnest now. I welcome our nominees.

Let me explain very briefly before my opening statement how we are going to proceed. We have three nominees, and I am going to make reference to all three. But we are going to introduce them one at a time.

Our first nominee will be introduced by the distinguished senior Senator from Massachusetts, and then we will finish that hearing. Then we will go to the second nominee and so on.

Today the Judiciary Committee considers the nomination of three critical positions at the U.S. Department of Justice: Philip Heymann, to be Deputy Attorney General; Webster Hubbell, to be Associate Attorney General; and Drew Days, to be Solicitor General.

We begin first with Philip Heymann, nominated to serve as Deputy Attorney General. The deputy serves as the chief operating officer of the Department, advising and assisting the Attorney General in developing and implementing policy and in supervising all units of the Department.

Of particular concern to me, the deputy oversees all criminal justice functions. Of the challenges our Nation confronts, it seems to me none is more critical than the continuing crime and drug problems that plague us. The increase of violence and of other crimes has placed terrible stresses on our judicial system, and on our courts and our prisons as well. And I will be anxious to speak to the nominee regarding these issues.

Addressing these problems will require a multifaceted approach. The Deputy Attorney General, more than any other person, bears the responsibility for coordinating what must be a truly national effort to fight crime. This is, in my view, his most important function.

Among other things, it involves forging a strong Federal partnership with State and local governments to fight crime where its toll is the greatest—on our streets, in our neighborhoods, in our schools, and in the smallest communities as well as our largest cities. It means putting the prevention of crime as well as a special focus on deterring juveniles at the top of our Federal list of priorities. It means enforcing Federal criminal laws across the board, effectively prosecuting financial institution fraud, environmental crimes, health care fraud, just to name a few. And it also means restoring the public's faith that our criminal justice system is both fair and effective; that Federal prosecutors pursue their goal vigorously, and that their goal is, quite simply, a just result.

I will ask Mr. Heymann to discuss some of these issues today so that the Congress and the administration can work together to address these problems in the future.

Next we will hear from Webster Hubbell, but I will refrain from referencing him at this moment, as well as Professor Days for Solicitor General.

But with that, why don't I yield to my distinguished ranking member, my colleague from Utah, Senator Hatch.

#### OPENING STATEMENT OF SENATOR HATCH

Senator HATCH. Well, thank you, Mr. Chairman.

I am happy to welcome you, Mr. Heymann, to the committee and congratulate you on this opportunity to serve your country once again in the Justice Department.

Mr. HEYMANN. Thank you, Senator Hatch.

Senator HATCH. It is a high and very important calling. You will basically be running the Justice Department on a day-to-day basis under the direction of the Attorney General, and I think it is a tribute to you that you have been asked by our President to do this particular job. And I look forward to working with you and look forward to the hearing today and to asking some specific questions myself. But welcome to the committee. We are glad to have you here, and we look forward to the hearings today.

Mr. HEYMANN. Thank you, Senator.

The CHAIRMAN. Well, again, welcome, Mr. Heymann. It is unusual to have a senior member of this committee on the other side of the bench, and now that I have the opportunity, I would like to ask him a few questions about policy. [Laughter.]

Senator HATCH. I have a few myself.

Senator KENNEDY. Exclusionary rule. [Laughter.]



The CHAIRMAN. Welcome to that side of the bench, Senator Kennedy, and the floor is yours.

### OPENING STATEMENT OF SENATOR KENNEDY

Senator KENNEDY. Thank you very much, Mr. Chairman and members of the committee. I also want to commend the President for this outstanding selection and join in welcoming the members of Phil Heymann's family who are here today.

Phil Heymann's life has been associated with excellence and public service. He enjoyed an extraordinary academic career, both in college and in law school, and then served as a Supreme Court clerk for Justice Harlan. Then Phil went into public service in the early 1960's in the Justice Department and worked with Archibald Cox and Thurgood Marshall, and he received the accolades of those two outstanding legal figures. Then Phil went to the State Department and served as the special assistant to Nick Katzenbach, and that sparked his interest in international criminal justice and justice systems in developing countries, an interest which he continued throughout his career.

After being in the State Department, he went out into the legal service programs. No job was too big, no job too small, to merit Phil's energies in the areas of public service.

After a stint as an assistant to the special prosecutor in the Watergate period, Phil went back to Harvard where he was the director of the Criminal Justice Center at Harvard University, focusing on the issues of corruption, and on terrorism, which he has written about. He found time to involve himself as a special assistant on the issues of sexual harassment in the National Football League, was an adviser to the Goldstone Commission in South Africa as that country was moving toward a period for self-determination.

And, of course, the cornerstone of Phil's career to date has been his tenure as Assistant Attorney General for the Criminal Division in the Carter administration. He filled that post with honor and distinction. So his career has been varied, it has been comprehensive, and each and every assignment has been marked by excellence and hard work and the highest degree of commendation. In a very real sense, his return to the Justice Department and his return to this committee, where he has appeared probably more than a dozen times on a wide variety of issues, will enable Phil to hit the ground running.

The Attorney General is going to be well served, the President is going to be well served, and, most of all, the country is going to be well served with Phil Heymann as the Deputy Attorney General. I hope the committee will overwhelmingly support his nomination and that we will have him on the job at the earliest possible time.

I thank the Chair.

The CHAIRMAN. Thank you very much, Senator.

Mr. Heymann, would you stand to be sworn? Do you swear that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. HEYMANN. I do.

The CHAIRMAN. Thank you. Again, welcome. And if you would, would you be willing to introduce your family to us. I see a young man sitting behind you there.

**TESTIMONY OF PHILIP BENJAMIN HEYMANN, OF MASSACHUSETTS, TO BE DEPUTY ATTORNEY GENERAL, DEPARTMENT OF JUSTICE**

Mr. HEYMANN. Senator, I think I would like to start with my wife, Ann Heymann, sitting immediately behind me.

The CHAIRMAN. Welcome.

Mr. HEYMANN. Then my grandson, Paul Brian Heymann, who is 10 years old, and he is sitting with his grandmother and behind his grandfather.

The CHAIRMAN. Welcome. The deal usually is, if you are under 12 years old and you have to sit through one of these hearings, you get to ask your grandfather to do anything you want after the hearing is over. [Laughter.]

And that is an order from this court, that he be able to do that. So think of something good. It can't be too expensive, but it has to be something that you would really like to do. That is the deal. OK? And if you get real bored, you can come back up in here and hang out in the back room over here where we do nothing. [Laughter.]

At any rate, welcome, and welcome to you, Mrs. Heymann.

Please, do you have an opening statement?

Mr. HEYMANN. I do, Senator.

Chairman Biden, members of the committee, I have not made a secret of the fact that I am extremely happy, indeed thrilled, to have been nominated to be Deputy Attorney General. The reasons are very simple. I believe deeply that the institutions of justice are essential to democracy.

I know what violence and drugs can do to lives. I helped a young man from Anacostia, here in Washington, to write his life story, and we remained friends for decades until he died in his forties as a result of a combination of drugs and bullets. I have four grandchildren. I cannot imagine bringing them up among the dangers and temptations that were part of John Allen's everyday life and that of his children after him.

I am not just talking about Washington, DC. It is true of Boston, where I live, and I have been talking with candidates to be U.S. attorney from Topeka, Oklahoma City, Omaha, and they say the same story, they tell the same story of fear, danger, and despair, all traceable to crime and to drugs.

If people lack personal security or doubt the fairness of the system or live in fear that those who hold government power are unrestrained by law and unaccountable, if any of these things or all of them are true or believed to be true, a person can't truly be a citizen, can't truly enjoy her rights or his rights. I have seen efforts at democracy without justice in Central America, in South Africa, and in the Soviet Union where I have worked. It does not work, democracy without justice.

The United States is a model of democratic reform for the rest of the world. The U.S. Department of Justice has been and should be a model of effective law enforcement and just law enforcement there and in our local and State jurisdictions. That is also why I want to be here.

Finally, the Department of Justice has been in my blood since 1961, through Robert Kennedy, Nicholas Katzenbach, Archibald



Cox, Griffin Bell, Ben Civiletti, and, for the last 2 weeks, through Janet Reno. While at Harvard, I taught courses centered on the work of the Department. The added bonus of these classes has been the pleasure of having attorneys and investigators up, people who I respect so much, from the Department of Justice to help teach them.

The illness of loving the Department of Justice is probably genetic. Paul's father, my son Steve, is deputy chief of the criminal section of the U.S. attorney's office in Boston.

With that, you are entitled to know what I can accomplish, what I hope to accomplish, what we can accomplish under Attorney General Reno's leadership. I want to mention three objectives, and they sound very much, Mr. Chairman, like what you said.

First and more important, the Justice Department must earn and maintain the trust and respect of our citizens. With that renewed trust and respect must come a renewed pride and commitment among the almost 100,000 employees who serve this cause of justice. To accomplish this, we be nonpartisan, respectful of process as well as results, and as open to the public as legitimate concerns for privacy and investigative secrecy allow. Above all, we must be receptive to the concerns of individual Americans, particularly those less powerful and less vulnerable than others.

Thirty years ago, in the Department of Justice, I had the opportunity to help defend the Civil Rights Act of 1964. The legacy of Robert Kennedy as Attorney General must stay with us.

Second, we must improve the effectiveness with which we perform the traditional missions of Federal law enforcement. These are missions that no other jurisdiction can perform and that are essential for the country. We cannot abandon our commitment to them, nor can we rely on anyone else to carry them out. It is a short list, and it is worth remembering.

Federal law enforcement must attack major multi-State or international narcotics traffickers, and it must deal with any other organized crime group so large, so threatening, or so geographically spread that it permeates beyond the effective reach of local jurisdictions. Federal law enforcement must pursue the perpetrators of large and complicated frauds, such as those that have infected some of our financial institutions. We must continue to root out public corruption. We have to protect Federal functions and revenues against theft or obstruction.

Then, Senators, I have to turn to a totally different jurisdiction, for no Federal responsibility is more important than that of dealing with problems of terrorism and of espionage. The bombing of the World Trade Center is a very dramatic reminder of that.

These were at the center of Griffin Bell's concerns when, together with this committee, we helped draft the Classified Information Procedures Act. Federal law enforcement has been remarkably successful in these areas in recent years, often as a result of that act.

And certainly Federal law enforcement has a special responsibility to punish civil rights violations and the most serious of environmental violations.

We have to keep and build and use intelligently the Federal law enforcement capacities in all these areas. At the same time, as we use them we should provide a model of how government power can

be exercised with respect for other institutions of democracy such as the press. With this committee, 12 or 13 years ago, I helped author the law protecting the media from searches designed to discover news sources or materials, the Stanford-Daley law. This concern for the impact of law enforcement on other democratic institutions has to be part of our charter, too.

Then, finally, of the three major tasks, beyond restoring trust in the Department of Justice and beyond discharging effectively and fairly the responsibilities that have long been Federal responsibilities, we have to address a national problem, one not traditionally Federal, but still so sweeping in its dimensions, so massive in its effect on the quality of the lives of our citizens that the Federal Government has not been able to stay out of it, cannot stay out of it, should not step aside, leaving it for local law enforcement. I am talking, of course, about the problem of violence and drugs in our cities and in our rural communities, too. Violence has moved beyond urban areas and is now pervasive in rural areas, too. That is what I heard from Omaha, Topeka, Oklahoma City.

While local or private organizations often play central roles in the question of local violence and drugs, we must act as partners, associates, and helpers because the problems are too large to be approached without Federal cooperation.

What can we do there? I can't speak as eloquently as the Attorney General. Few people can. But I share her views on how we have to proceed.

We must have strong punishment of offenders where their prolonged careers or the viciousness of their acts demand it; and at the same time, we must demonstrate a willingness to explore a wide range of other preventative strategies.

Fighting crime is too important—the harms that crime is doing to our violence-ridden society too costly—to fail to utilize every weapon at our disposal.

Mr. Chairman and members of the committee, let me close by saying just a word about some ideas we have as to just how the Reno Justice Department will go about these three major tasks.

One, a sharpened focus on the harms our laws are intended to prevent, and some skepticism about solutions that are more symbolic than effective in combating these harms. We want results.

Two, great respect for the role and wisdom of local neighborhoods and local leaders, and a desire to see programs and decisions flowing from those at the front lines. I think you could detect that in everything Attorney General Reno said before this committee. We want to work with, learn from, and cooperate with local law enforcement and others in urban and rural communities who have long struggled with the problems of violence and drugs. We do not think we know better. We know that we don't know better.

We want to display a bold willingness to try new things while preserving what is valuable in the old. The problems are too big, too important, to fail to try new things.

We will be impatient with turf battles because we are all, Federal and State agencies, pursuing the same ends with resources inevitably too few for the task.



Finally, I hope you will find us frank about our successes and failures, our hopes and our prospects, even though frankness may subject us to criticism.

In fighting crime, Mr. Chairman and members of the committee, we are all in it together. Thank you very much. I look forward to answering your questions.

The CHAIRMAN. Thank you. We will proceed with the 10-minute rule, if that is appropriate, if that is all right with my colleagues. Or do you want to go longer?

Senator HATCH. I think we ought to have 15.

The CHAIRMAN. We will make it a 15-minute rule to accommodate those who have more questions.

Let me begin by asking you about something very topical, and that is the Waco investigation. Two days ago, the New York Times reported comments by you about the scope of the Justice Department's investigation of the events in Waco, TX, relating to David Koresh and the Branch Davidians. Specifically, you were reported to have said the investigation would not include a review of the decision to mount an assault on the compound with tear gas and with tanks or interview the Attorney General or other key decision-makers.

Subsequent reports have suggested that you may have been misunderstood and that a full investigation will occur.

As you know, Mr. Heymann, I have stated that this committee would await the results of the investigation called for by the President before undertaking its own independent review of the operation. But, quite frankly, my decision was premised on my understanding that the Department of Justice, as well as the Department of Treasury, would undertake an exhaustive review of all relevant activities. Learning from that event, a goal all of us seek, requires an evaluation of the entire operation, in my view. Quite frankly, what, how, why, and who made key decisions is central to that process.

I know that you cannot nor should not discuss the specifics of an ongoing investigation, but I ask in general whether the press accounts accurately characterize your intentions. What are your general plans for an investigation of the Waco incident?

Mr. HEYMANN. Senator, my plans are, and have been for over a month—whenever it started, April 29—April 19, excuse me—to conduct the most thorough, detailed Justice Department investigation that one can imagine. Ever since that time, we have scheduled about 900 interviews. I think we are going to be able to tell you what happened on—if you pick a date, April 13 at 10:15 or 10:17, I think we are going to be able to tell you what happened at 10:17.

The investigation is without bounds. We alerted the Attorney General on April 20, we alerted the Attorney General that she would have to be interviewed and would be interviewed. That is, of course, true of Judge Hubbell and everyone else who was around at the time.

The CHAIRMAN. So it will include investigating and interviewing the principals as well?

Mr. HEYMANN. Yes; and certainly the heart of it, from the Justice Department's point of view, is likely to be April 19, the day of the fire.

The CHAIRMAN. Now, that makes me feel better, quite frankly, because we would not have withheld pursuing our own investigation were it to be a truncated investigation on the part of the Department of Justice. And I appreciate your clarifying your statement.

I mentioned and you have mentioned, and many others, the problem of violence in America. When you and I sat in this position 12, 14, 15 years ago—maybe it is longer, 16 years ago, I guess—it was a different situation. There was violence in America in 1976, but not to the degree that exists today. And one of the things that has taken place is the threshold for violence, the tolerance of the American public seems to have been lowered. We seem to accept things as if they were inevitable today more than we did 16 years ago.

Second, it seems to me that another feature of violence in America that has an alarming proportion is that those who perpetrate the most violent crimes in America are younger and younger and younger. It used to be, if my memory serves me correctly—and this is from memory—that the most violent offenders in our system, in our society 20 years ago were around age 18.

Mr. HEYMANN. I believe that is correct, Senator.

The CHAIRMAN. I think they are closer to around age 15 now than age 18. And, quite frankly, one of the things the Federal Government can do that State governments are not able to do is examine not only how to deal with violence once it occurs, but try to get a handle on it by gathering up the leading criminologists and experts in the Nation as to why this phenomenon is occurring.

I don't think there is any single answer. We have made a stab at it here, and we will continue to do so. But one of the things that we can do, this committee—and the Justice Department more generally and in line with what General Reno has indicated her desire is—is to take a more basic look at the system and the cause of violence in America. I would like to ask in that context the following question:

Do you have any plans or would you consider convening through the Justice Department, possibly with or without the help of this committee, or on your own, an attempt at taking a look at and studying the changing face of violence? What are the social reasons for it? What are the underlying causes of it?

There was an interesting article yesterday in the newspaper, reprinted today in our local paper, by William Raspberry. He quotes several criminologists as indicating that one of the things that they argue—I don't know this to be true—is that the absence of fathers in families has a dramatic impact; that does not break down based on race or even on income, but there allegedly is a correlation between violent behavior and those who commit violent crimes, young men in the main, and not having any male influence.

I don't know whether that is true or not, but I do know we have to do something more than pass crime bills, which Senator Thurmond and I and everyone on this committee have made a habit of attempting to do. It is necessary. We have to do it. But something more has to be done for us to get a handle on this, and I wonder whether you could share with us from your background as the head of the Criminal Division as well as a professor and someone who is well read in this area as to what we should be looking at.

Then I want to ask you some very specific questions about crime legislation.

Mr. HEYMANN. Senator, I like very much where you begin. I think we should bring together people who have looked very hard at youth crime, at why it is getting younger and younger and more violent and more violent.

I read everything I can get my hands on about that, like the New York Times pieces, but I have, with Attorney General Reno, invited some of the leading experts—Tony Earles, who is conducting a massive study with McArthur Foundation funds in Chicago; Deborah Prothrow-Stith, who is an expert in gangs; and a number of others—to meet on June 11 with the Attorney General. I think it would be a very good idea if we could find a way to include staff of the committee on occasions like that.

The CHAIRMAN. I just think it is a useful thing, since we are both pursuing this, that instead of having high-profile hearings on this, if we could begin to establish some common ground.

One of the problems, to be very blunt about it, is that a number of areas have been basically taboo. Just raising the question of whether or not the absence of fathers in the homes impacts upon violence raises a whole range of politically correct and incorrect questions, whether or not it is appropriate for me to raise it.

I don't know the answer to the question. We held hearings on why women are increasingly the victims of violence at a much more alarming rate and a progressive rate than men in our society. More women are victimized in real terms, and more women relative to men are victimized, and the number of crimes of violence against women is increasing at a much faster rate than against men.

As Mrs. Clinton said at my son's alma mater yesterday, at the University of Pennsylvania, we can't be afraid to raise issues that may put us in areas that are "politically incorrect." I hope you will not have any limits to what you are prepared to look at, and I would welcome the ability of staff, minority and majority staff if that is appropriate, to get on the ground floor with you as you begin to look at this.

Mr. HEYMANN. I think there is nothing on our agenda that is as important as the question you are raising, Senator Biden. I have some ideas, but unless you are anxious for me to tell them, I think maybe we should just wait.

The CHAIRMAN. No; I just wanted to get a sense of whether or not we are in the same ball park or approaching it the same way.

Mr. HEYMANN. Absolutely, and I think it has to be as open as you describe, Senator Biden.

The CHAIRMAN. Now, let me be very much more specific and, some might suggest because of the role of this committee, slightly more parochial. With the help of the Senator from Utah, and everyone on this committee, particularly on my side of the aisle, the distinguished Senator from California, we are pursuing putting together, with the Attorney General and with the U.S. attorneys general and with the police, a crime bill that we hope we can pass this year. And there are many solutions that are offered to deal with crime, one of which is dealing with two things that we know have impact on crime.



The first is that more police on our streets means less crime. You said one of the areas where there is a legitimate Federal role is when there are complicated fraud cases or when there are cases that involve large organized crime units or quasi-organized units that are beyond the purview of one State and flow over borders of States that don't allow States to be able to do it alone.

The second thing that seems to be one of the things that we know is that punishment for all criminals, if it is to have any effect, has to be swift and has to be sure to provide strong disincentives to crime.

The third thing that seems to be clear from the years of hearings we have conducted, beginning when the Senator from Massachusetts was chairperson of this committee, is the role of guns in the commission of crime and the nature of the violent crime.

We had hearings here where we brought in the heads of the trauma units of some of the largest hospitals in America because we were holding hearings on the murder rate exceeding 23,000 murders in America. And I asked the question whether or not there were more people being shot, was that the reason why. It sounds like a very simplistic question, and as a matter of fact, the answer seems self-evident. But the answer we got was interesting. The correlation of the additional number of people shot relative to the number of people who have died does not account for why so many more people are dying when shot. It relates to the nature of the weapon used.

One of the doctors who headed one of the largest trauma units in America said, "We have made phenomenal strides," she said, "in our trauma units. We can do incredible things we couldn't do 15 years ago. Yet more people are dying." And she said, "It used to be that when a gunshot wound would come into our emergency ward, it would be a .22-caliber slug lodged"—whether it is in the head or the neck or in the thoracic cavity—she said, "Even when it was next to the heart, we had a chance of saving that person." She said, "Now we don't see single-shot wounds. We see multiple shots. They start at the knee and end at the neck, and when a .45-caliber bullet goes into someone's chest, it does not lodge in the lung. It blows the lung out of the body." And so the third thing seems to be guns.

My question is this: Do you believe that, one, we have to provide, as a shared responsibility with local law enforcement, the resources for them to have more police officers on the street? Two, do you believe that we can and should do something about the nature of weapons that are permitted to be sold on the street? And, three, what is your view with regard to any changes we should make and how swift and certain penalties should be, once imposed, relative to the length of the sentence? Which is more important: the swiftness and the speed with which it is imposed, or the length of the sentence?

My time is up, but if you would answer those questions, I would appreciate it.

Mr. HEYMANN. Senator, my answers can be given rather quickly. I don't think there is anything more important that could be done now with regard to crime than getting 100,000 police out on the

street and getting them taking very seriously the best modern notions of community policing.

As all of you know, there is a revolution going on in theories of policing. Everyone in the police world believes that community policing is a much better answer, but it takes people. So my answer to that is nothing is more important than the 100,000 police tied to—

The CHAIRMAN. If you can be precise about that for the public, when we put one person in the squad car, you can cover a lot more territory. But when you have community policing and you have two people—one police officer or two police officers—walking side by side through the community to cover the same territory, you do it more effectively but it takes more police. Is that right?

Mr. HEYMANN. That is correct, Senator. Another way of saying it is if you have the community on your side, you are not talking about two people in a squad car. You may be talking about 20 or 200 or 2,000 people who are prepared to help the police. But to have them on your side, the police have to be out there talking to them, dealing with them, helping them in a million ways.

Second, I have never done a lot of study of particular provisions on guns; but in connection with this hearing, I have looked at the provisions with regard to the Brady bill, and I am convinced that they will help, that many guns are bought in ways and by people who could not get them if there was a check on their background. I also think, as I know the President and the Attorney General do, that assault weapons, defined as things that are not good for hunting and not designed for hunting, are a very serious problem to be addressed.

Finally, some of the solutions that I think we ought to be looking at, particularly in the drug area, are solutions precisely because they substitute certainty for more severe but much less certain punishment. Criminals aren't the best people at—young criminals aren't the best people at considering the fact that they may be sent to jail in 5 years for 20 years. Certain, swift punishment helps a lot.

The CHAIRMAN. Thank you.  
Senator Hatch.

Senator HATCH. Thank you, Senator Biden.

I have discussed the issue of rural crime in States like my home State of Utah with Attorney General Reno on several occasions. It is very important, and I think it is an issue that deserves far greater attention than it is getting.

I want to see the Federal Government pay closer attention to the concerns of States like my home State of Utah and the problems of rural crime. Nationwide, in 1991, FBI figures showed that violent crime rose 35 percent faster in rural counties than it did in America's eight largest cities.

So sometimes the headquarters of the Federal agencies here in Washington downplay the problems of violent crime and drug dealing in some of these more rural States. Yet we have youth gangs coming into our State from Los Angeles and elsewhere. Drug traffickers are not only using Utah as a transshipment point; more and more of them are starting to drop drugs off in Utah, and it is killing our young people.

So I wanted to bring that to your attention.

Mr. HEYMANN. Yes, sir.

Senator HATCH. And I think, noting your opening remarks, you would be very empathetic with what I am concerned about there.

Mr. HEYMANN. I agree 100 percent, Senator.

Senator HATCH. Well, thank you.

I have also filed a bill on telemarketing fraud that has recently been the target of an aggressive FBI campaign in Operation Disconnect. It originated in my home town of Salt Lake City in Utah. Generally, this form of criminal activity involves the defrauding of victims through a phony telemarketing or direct-mail operation, and it is generally targeted at the senior citizens in our society.

In fact, more often than not, our Nation's elderly are being targeted as victims of these scams more and more. And so we recently introduced legislation, Chairman Biden and myself, to beef up funding for investigators and prosecutors and strengthen the Federal response so that we could go after this sort of fraud. And I hope that you will be willing to help us there as well.

Mr. HEYMANN. I will look at it very seriously, Senator Hatch.

Senator HATCH. Well, we want to work with you in this area.

Mr. HEYMANN. I would like that, too.

Senator HATCH. It is my hope that the FBI can continue its efforts against fraudulent telemarketers and that it can also play a role in educating potential victims, particularly our senior citizens.

Mr. Heymann, I am also concerned about some of the signals this administration has been sending the American people about its commitment to continuing the fight against illicit drug abuse. In this morning's New York Times, A.M. Rosenthal expresses, you know, these very same fears that I am expressing. And if you would permit me, I would like to read just some excerpts from his column this morning.

Before it is too late, Americans should realize that the concept of the war against drugs is in danger of being dismantled, and the result will be creeping legalization. If that is what they want, fine. They can get it by just keeping silent.

Mr. Rosenthal goes on to point out that everybody interested in fighting drug addiction has, until recently, agreed that:

The struggle could not be won by one weapon, but only through an irreducible variety, each strong. They were six: reduction of foreign drug crops, interdiction of drug smuggling, enforcement of laws against making, selling, or using drugs, education against drugs, treatment of addicts, Presidential leadership.

I think he summarized that about as well as it could be summarized. I want to commend him for it.

Now, do you believe that these are the elements that are essential in making this war against drugs a reality in our country?

Mr. HEYMANN. Absolutely; I do not think that anybody in this administration believes in legalization of drugs, Senator Hatch, and I think that the fight has to go on all those fronts that you described. I even wonder whether there are one or two that I would have added.

Senator HATCH. Well, Mr. Rosenthal states further, he said, "Now four of the six of these points are in question: reduction, interdiction, enforcement, leadership."

He goes on to note that:



Elected and appointed officials are making it clear that they have no real interest in some of the essential instruments of the struggle.

Now, frankly, I believe he is right on target here, that there is not the aggressiveness that we need to have. The administration has only recently named a drug czar. I think he is a good person, and I intend to support him. The office's size has been greatly diminished. The budget allocations for prosecutors have been reduced. Prison construction is being cut. There is talk about not prosecuting certain drug offenses, and interdiction efforts will be cut back, according to some in the administration.

On the subject of interdiction, Mr. Rosenthal writes,

Interdiction is now routinely called a failure by trendees because it did not seal off America. That was not the goal, just to make life harder for the drug trade, instead of saying come right in and ruin us. But some in the Clinton administration, including Attorney General Janet Reno, make it known that they do not have much interest in pursuing interdiction. How would you like to be an American agent risking his life to fight drug smuggling and production?

Now, can you reassure this committee, despite what Mr. Rosenthal lists as signals to the contrary, that this administration will continue a vigorous interdiction effort?

Mr. HEYMANN. Senator, I am sure that we will continue a vigorous interdiction effort. I would like to make clear that I think with a new drug czar, with a new administration, it is wise—with every new administration—to consider the balance, where the dollars can be best spent, among the law enforcement side, eradication, interdiction, going after large organized crime groups, vicious groups in the United States, and going after street dealers, which many experts believe is the most effective way now to prevent drug dealing. And these questions just have to be raised. There will be a debate on them, but the questions have to be raised.

That we will be vigorously pursuing interdiction, I have no doubt, Senator Hatch.

Senator HATCH. Well, thank you. I appreciate that. I want, in fairness to the President, to quote Mr. Rosenthal one final time. He says:

I do not suggest a conspiracy in Washington, just trendiness, mushy thinking, lack of commitment. Perhaps that is a matter of middle- or upper-class background where it is easier to quit drug use so it all seems not so terribly terrible. The legalizers will take advantage of all that creep by creep. They will achieve de facto legalization unless Americans speak up, most of all President Clinton.

I think what he is trying to do is to prod the President, naturally, and he is doing a pretty good job here. I hope President Clinton and the rest of the administration will heed the insight of Mr. Rosenthal and begin to demonstrate a strong commitment to sustaining a vigorous national effort against drugs.

So I just wanted to bring that to your attention because I am very concerned about those six elements as well, and I think he wrote an excellent column that really all of us could grow from and learn from. And I just wanted to make sure that you feel the same way as I do about it.

Mr. HEYMANN. Senator, could I mention one thing that I think we will have to take seriously? There is one remedy that the people who study drugs and drug experts regard as the most promising in many ways for the people that it handles, and that is one that

Attorney General Reno has mentioned in her testimony. She talks about carrot and stick.

When somebody is on drugs and commits a burglary, that person ought to serve a sentence for the burglary and ought to be punished for the burglary, and there ought to be retribution and there ought to be deterrence. But then if a long parole period involved saying to the person:

You are coming in twice a week for drug tests, and if you flunk the test, we are not threatening you that we are going to send you away for 15 years. What we are going to do is, if you flunk the test, you are going to jail for 2 months, tomorrow.

It relates to Senator Biden's question about certainty.

And in 2 months, we will let you out again on parole. But if you flunk the test next time, we will try 4 months. No mistake about it, Mister. Don't think you are getting away with it. Don't think, well, it is 15 years, but they are not likely to catch me. You are coming in twice a week, and we are going to catch you.

The experts say that a very large number, a very large part of the drug market would be eliminated by that simple step. And that is the type of thing that I think we want to think about, and that is the type of thing I think Janet Reno has been talking about.

Senator HATCH. Well, we will be interested in working with you in those areas, and I hope we can be of assistance to you.

Mr. Heymann, in 1980, when you were heading up the Criminal Division of the Department of Justice, this committee conducted an investigation of the Department's handling of an undercover investigation of fugitive financier, Robert Vesco. In fact, my distinguished colleague, Senator DeConcini, and I were assigned lead responsibility for that probe.

Specifically, the Department's undercover investigation dealt with allegations that Vesco had tried to bribe certain Carter administration officials to reverse a ban on the shipment of U.S. airplanes to Libya. Among other things, our staff report concluded that there was competition rather than cooperation and coordination between the U.S. attorney's office in the Southern District of New York and the FBI; one of the key figures in the case was both an informant and a target; that the investigation was run with almost total disregard to U.S. policy; that the U.S. attorney's key informant "who compromised his safety and spent his own money" as part of this investigation was subsequently indicted. The U.S. attorney's office treated one of the principal figures in the case who was the head of the Democratic National Committee better than it treated its own informant.

The report very strongly condemned the conduct of the investigation, and I want to give you a chance to respond to that criticism and answer these concerns. I also would like to ask: How will you address allegations of illegal conduct by Clinton administration officials or friends and allies of the Clinton administration should such allegations be made? Will those allegations be treated with the same vigor as allegations against other citizens?

If you could respond on that, we would appreciate it.

Mr. HEYMANN. Senator, this, I am afraid, will sound a little self-serving, but I think that I have a record on allegations against the administration that I served that is unequalled, not only in this country but anywhere else.

The last time I was here, I asked a special counsel to be appointed to investigate the President of the United States. I brought charges against the Director of the Office of Management and Budget. I filed a foreign agents registration case against the brother of the President, Billy Carter. I had special counsel appointed for the chief of staff of the President, Hamilton Jordan. I had a special counsel appointed—I guess they were called special prosecutors then rather than independent counsel—for another White House official, Tim Kraft. I directed that \$25,000 be offered by a man pretending to be a sheik to the head of the Democratic National Party, Mr. White, which he turned down.

I don't think there is any country in the world that would permit its prosecutor—any other country in the world that would permit its prosecutor to do that. I don't think there is any administration that has been subjected to that kind of investigation by its chief prosecutor. And I think, if I may, it says that you may feel some confidence that I will not treat the officials of President Clinton's administration with undue tenderness.

Senator HATCH. I appreciate your comments. Let me just pursue this case just a little bit further, and I think it is important because, as you are aware, you have been criticized for your handling of public corruption-type cases, whether rightly or wrongly. And I think it important at a hearing like this that we afford you an opportunity to respond, just as you have.

The investigation into Vesco's alleged attempts to bribe some key Carter administration figures effectively ended, some feel, when you refused a request from the U.S. attorney for the Southern District of New York for additional funds—and I believe we were talking about roughly \$23,000 at that time—for an informant.

Some of the investigators who were working this case say that the refusal effectively killed this investigation, and it did so when they were making progress in the direction of some very powerful and important people here in Washington.

You later told the Appropriations Committee that you were concerned that the informant would keep asking for more money and that enough had been given to him already. At least that is what was reported. Yet the investigators said that the money was critical to their undercover operation, and they outlined why further requests might not be forthcoming.

Now, in ABSCAM, which I believe you supervised to some degree, you spent a lot more than 23,000 bucks to pursue some people on Capitol Hill. And so if it is true, why would you have refused a request by a New York U.S. attorney for a mere \$23,000 when the investigation was pointed at people in the administration?

Mr. HEYMANN. Senator Hatch, the informant in that case, Mr. Feeney, was distrusted intensely by the FBI. The source of funds was to be the FBI. The FBI believed and told me on that occasion that they believed Mr. Feeney had just gotten \$150,000. The claim from the southern district was that he was in desperate straits and needed the money to pay a debt to one of the other con men involved—and he was a con man—a con man involved in the investigation. They felt he didn't need the money, and they didn't want to spend their money. And they thought this had gone on for a long time.



Now, again, Senator Hatch, if the question was might he have gotten John White, the head of the Democratic National Committee, if he had gone on further, when they didn't agree to fund Feeney any longer, the next thing they did was approach Mr. White with an offer to pay him money in a transaction of this sort that Feeney was describing and Mr. White turned them down.

Senator HATCH. Yes; I have never had any problem with Mr. White personally.

My time is up, but, Mr. Chairman, I just have one last question. I thought I needed to get through this, and I think you need to do it, too, and you are doing very well.

I would like to just ask you a question about accountability. When you were running the Criminal Division at the Department of Justice, the committee had difficulty in getting access to a number of files in some public corruption cases. You forced the committee to go to court to get those documents, and the court eventually ordered you to turn some of the files over to us so that we might proceed with our oversight responsibilities.

Now, in the context of that action, as ranking member of this committee, I would like to know whether we can expect full cooperation from the Department when we fulfill our oversight responsibilities in sensitive cases that do come before the committee that we have to investigate and have to resolve.

Mr. HEYMANN. Senator Hatch, the answer is yes, you can expect full cooperation. I would like to remind you, because I have had an opportunity to go over this more recently than you have, that the result of a prolonged—and perhaps unnecessarily prolonged by me—refusal to produce those files was a set of proposals designed by Senator DeConcini, Senator Kennedy, and Senator Thurmond to make sure that the committee could have full oversight and at the same time protect the private interests of individuals that I was concerned with.

At the end of this, Senator Thurmond and Senator Kennedy sent a letter to the Attorney General saying we will agree to these procedures, but we want those files. And they were delivered. I would like to urge us to at least begin by taking a look at the understandings that were designed by Senator DeConcini, eventually adopted by Senator Kennedy and Senator Thurmond. I think they are a very good start at balancing full oversight with privacy protection.

Senator HATCH. Well, thank you. I am the first to admit that you were in a very tough position in all of those areas, getting conflicting advice and everything else.

Mr. HEYMANN. But we got from the Senate very good advice at the end, and I would like to send up a copy of what we got from the Senate.

Senator HATCH. Well, thank you, and we will review that again. We appreciate your willingness to cooperate with the committee as we get into some of these problems.

Mr. HEYMANN. Thank you, Senator.

The CHAIRMAN. Thank you.

Senator Kennedy.

Senator KENNEDY. I would just reiterate what Mr. Heymann has said with regards to the background on that matter. Even the Senate legal counsel, Mike Davidson, who was in what would be con-

sidered an adversary position, made it very clear to us that this was purely a legal issue, and we worked through the process to deal with privacy issues and the legitimate interest of the Senate. There have been some who have been trying to make something more of it, but perhaps, Mr. Heymann, you would want to provide for the record any other kind of additional information that you think would be useful.

Mr. HEYMANN. Thank you, Senator.

Senator KENNEDY. I think Mr. Heymann's record on this is exemplary, as it is in other areas.

Just to go back to the drug policy issue, I just want to say that I hope you are not going to pursue the same failed drug policy that we have had in recent years. I hope we are not even going to use current policies as a departure point. The President has clearly indicated interest in a new direction by appointing Lee Brown as the drug czar. Dr. Brown knows about tough law enforcement, but he agrees with what the Attorney General has stated, that we need a balanced approach.

There isn't a person in law enforcement who doesn't understand that there are drugs in every major prison facility in this country. So while we all want interdiction to work, if you can't keep drugs out of jail, how can we keep them out of the country? I think we have to start looking, as you have pointed out, anew in terms of how we are going to deal with this of issue.

As I read your writings, you believe strongly that we need a balanced program.

Mr. HEYMANN. Yes.

Senator KENNEDY. I can remember when the previous administration cut back on inspectors, for example. Various chemical companies were exporting chemicals that were going to Europe and then heading right down to South America and were an essential part of manufacturing of these drugs that were being shipped back here. And 40 percent of the weapons that are used by the Medellin cartel are manufactured here in the United States. So enforcement is not simple.

At some time we have to hear the wake-up call about these matters, hopefully, and I have been impressed by the commitment that you and Attorney General Reno will bring to these issues.

Let me raise the issue of youth crime. I just know we haven't got enough metal detectors in this country to stop guns from going into schools every day. We probably have to put them in those schools to try and provide some protection, but hopefully we can also begin to look at more constructive approaches.

I have seen one very troubled school in my own State, Putnam Vocational High School in Springfield, MA. That school had more dropouts, more crime, more violence, and more drug use than almost any other school in the area. Then they began to change, they began to identify young people at risk, developing mentoring systems, trying to involve many of these young people in school programs and also in the community. There was a dramatic reduction of violence, dramatic reductions in the use of weaponry, dramatic reductions of teenage pregnancies and other problems.

So I know that you will look at what General Reno has pointed out, and that is the importance of prevention in law enforcement.

Mr. HEYMANN. Senator, I think there is a whole range of prevention strategies. The ones that Attorney General Reno often emphasizes are ones that involve even the youngest people. She says in her testimony that by 10 or 12 years old it is sometimes too late.

There are other prevention strategies that have been tried in Massachusetts. Congressman Kennedy talked to me about one that is really quite dramatic, the prosecutors going out in the town—I have seen it, too—in the city of Lowell where Cambodian gangs, gangs of young Cambodians were terrorizing the community, talked to people, talked to enough people, had enough big meetings that people would be willing to say who it was that was terrorizing them. And then Tom Riley, the prosecutor, got police to pursue the people who were terrorizing the community the way the Federal Government pursues organized crime. Soon they were all arrested for crimes they were committing, and the community was not terrorized.

Mayor Goldsmith of Indianapolis, a Republican, and Mayor Schmoke of Baltimore, a Democrat, together have a notion of what one has to do, which is, again, a prevention strategy. Their prevention strategy is that you have to go into a neighborhood, that you can only win against crime in a neighborhood if the people there are willing to cooperate with you. But they will only be willing to cooperate if you can say to them, "You can have a neighborhood here. There is some chance of having a way to live together in this place. You won't be able to do it unless you cooperate against crime, because there is no living here. But if you do, if you take the responsibility, we will work with you, and we will go to Federal agencies that can help and bring you the little bit of help." We are not talking about a lot of money. That is what they want. It makes a lot of sense to me. If it sounds like weed and seed to you, it is an improved version of weed and seed.

There are other strategies, too, Senator.

Senator KENNEDY. Well, we appreciate that and look forward to working with you. I spoke at the Simon's Rock commencement over the weekend where a disturbed student went out and bought an SKS automatic system, killed two, a professor and a student, and wounded four others last December.

I am just wondering about your own position on extending the handgun waiting period to include assault weapons. I am for prohibiting the manufacture and distribution of these automatic weapons. They have no purpose other than killing human beings. But can we at least get assurance from you that a Brady-type of a waiting period for assault weapons would be something that you could support?

Mr. HEYMANN. Senator, I think we have to—I think we have to consider very seriously at least waiting periods and perhaps more when we are talking about assault weapons. And, of course, the Brady bill itself deals with much more than that.

Senator KENNEDY. OK; well, we will look forward to that.

The President has sent us his national service program. It was an honor to have the chance to introduce it in the Senate. The President is trying to provide opportunities for service in a wide variety of different areas: health in underserved areas, math/science teachers in schools, and also in the areas of law enforcement.



Is this something that you think would be of value in law enforcement agencies in this country?

Mr. HEYMANN. I think, Senator, that there are really two different programs there: the National Service Corps Program that will do some things, not provide police but provide assistance, and the Police Corps. And both of them have a role in the 100,000 police initiative.

Senator KENNEDY. Good; and just finally, in terms of bringing together the various law enforcement agencies—I am sure you are familiar with the kind of overlap which has existed in the past. I think one of the compelling aspects of your service has been an effective management style in bringing different groups together. Would you tell us a little bit about what you think can be or should be done in the area of coordinating law enforcement, cooperating both with the DA's and also with the U.S. attorneys and other prosecutors?

Mr. HEYMANN. Not only in the United States, but in every country, getting different law enforcement agencies to work together is a major problem. It has always been in the United States, and it still is. The agencies are concerned about other agencies trampling on their jurisdictions. But we can't tolerate that. We have to find a way to avoid jurisdictional fights.

Now, it goes through the Justice agencies; it goes through the Justice agencies and the Treasury agencies; and I suppose it probably includes the postal inspectors, too.

I don't know what the right answer is. I do think that we ought to at least think about—and I don't have an answer to it—whether in the criminal investigative area one might consider what was done in the intelligence area so many years ago; that is, give a special role to the Attorney General, not in terms of managing things, but simply in terms of coordination, certain relatively limited coordination capacities.

Senator KENNEDY. Well, we thank you very much. We are looking forward to working with you, particularly in the areas of treatment programs and rehabilitation programs, as well as education programs, in a balanced effort to try and deal with substance abuse in this country.

I want to thank you very much, Mr. Chairman. My time is up.

The CHAIRMAN. Thank you.

Senator Thurmond.

#### OPENING STATEMENT OF SENATOR THURMOND

Senator THURMOND. Thank you, Mr. Chairman.

Mr. Heymann, we are glad to have you with us.

Mr. HEYMANN. Thank you, Senator.

Senator THURMOND. Mandatory minimums have been enacted by the Congress for a number of crimes, although drug-trafficking offenses or offenses involved firearms and violent offenders make up the bulk of Federal sentencing in this area. Do you believe reform of mandatory minimums is advisable? And do you advocate treating drug offenders differently under mandatory minimums than violent offenders?

Mr. HEYMANN. Senator, I think there is room for mandatory minimums, and I think for the most serious of crimes and the most

severe of crimes mandatory minimums have long been a tradition in the United States.

I do think that the Senate has created an extremely attractive alternative, and that is the Sentencing Commission. The Sentencing Commission is appointed, and its members have to be confirmed by the Senate. Every recommendation on sentences that it makes has to lay before the Senate and the House and has to be accepted.

It is a group that has by now a tradition of being thought of as tough on violence, drugs, tough on crime, not soft on crime. But it also a group that was given the capacity by the Congress to consider prison space, equity across crimes.

So my answer to you is there is some room for mandatory sentences in the worst of crimes, but I certainly think a major reliance on the Sentencing Commission is a very wise starting place. And I know you had a great deal to do with creating that, Senator.

Senator THURMOND. In 1987, as senior counsel for Common Cause, you authored a report entitled "Why the United States Senate Should Not Consent to the Nomination of Judge Robert H. Bork to be a Justice of the Supreme Court." In that report, you spoke of Judge Bork's unwillingness to make clear how much fidelity he would show to the articulated philosophy of an adult life, and how the Senate had an obligation to conduct a rigorous review because of his past writings, speeches, and interviews.

The question is: Do you advocate this same rigorous review standard and accountability for Lani Guinier, whom President Clinton has nominated to serve as Assistant Attorney General for the Civil Rights Division?

Mr. HEYMANN. Senator, I recommend the identical standard of review for any Supreme Court nominations that will come before this committee. I think the situation of an Assistant Attorney General is a little different. An Assistant Attorney General, whoever it is—Lani Guinier or anyone—reports in the case of the Civil Division, a division on the civil side, to the Associate Attorney General, and through the Associate Attorney General to the Deputy Attorney General, and through the Deputy Attorney General to the Attorney General. That is a lot of levels that a person would have to persuade if one were to urge views that were novel and not easily persuasive.

It is a very different for a Supreme Court Justice. A Supreme Court Justice can write an opinion tomorrow, and we have got law in the country.

Senator THURMOND. So you advocate a different standard for the Assistant Attorney General for the Civil Rights than you would for a Supreme Court Justice?

Mr. HEYMANN. For any Supreme Court Justice, yes, sir.

Senator THURMOND. As you know, the Attorney General is opposed to capital punishment. Do you support capital punishment?

Mr. HEYMANN. Yes, sir; I support capital punishment for crimes of real heinousness, for very bad crimes.

Senator THURMOND. As Deputy Attorney General, you will be involved when the Congress turns to consideration of a comprehensive anticrime bill. Last year the conference report was not adopted

because of its inadequate reform of habeas corpus. I would say that was the chief reason.

What is your opinion of habeas corpus reform language which would allow inmates currently sitting on death row to go back to the courts years after their convictions and challenge their sentences on issues having nothing to do with their guilt or innocence?

Mr. HEYMANN. Senator, I haven't looked at the language carefully of the crime bill, but I think that the conference results are moving very much in the right direction. I think we should be cutting off successive reviews, particularly if they have nothing to do with guilt or innocence. But I think we ought to be making sure that the trial is fair in the first instance.

I think when the two of those are matched, you are coming up with a system that is a lot better than the present system where oftentimes the trial is not fair because the defense representation is so bad, and then there is no punishment no matter how guilty the guy is because it goes on for 15 years.

Senator THURMOND. Now, this conference report allowed defendants to go back to the courts years after their convictions and challenge their sentences on issues having nothing to do with their guilt or innocence.

Mr. HEYMANN. Well, I haven't—

Senator THURMOND. You wouldn't favor that, would you?

Mr. HEYMANN. I think that we ought to try to—

Senator THURMOND. Well, I am not asking you that. I asked whether you favor that or not.

Mr. HEYMANN. It is only the characterization of the conference report that I just don't know, Senator. I haven't even read the conference report itself. I have read about it.

Senator THURMOND. Well, I told you what it held. I am asking you whether you favor it or not.

Mr. HEYMANN. I am not—I oppose returns after a fair trial and a fair Federal review again and again on issues that have nothing to do with innocence; yes, sir.

Senator THURMOND. Thank you.

Generally speaking, do you support the so-called one-bite-at-the-apple rule, that capital cases should be subject to one complete and fair round of review in the State and Federal system?

Mr. HEYMANN. Yes, sir; perhaps with the notion that you raised the first time through. If there is suddenly new dramatic evidence of innocence, that might make a difference.

Senator THURMOND. Mr. Heymann, was the Attorney General the first person in the administration to contact you concerning this nomination to be her top assistant?

Mr. HEYMANN. The first person to contact me was Deputy Attorney General—no, I am sorry. The first person to contact me—I was in Israel—was Chuck Ruff, who happens to be a friend of mine and who was helping out at the time. I should point out, Senator Thurmond, that I have not ever met President Clinton or Mrs. Clinton to this day.

Senator THURMOND. Well, I didn't ask that. [Laughter.]

Mr. HEYMANN. I know, Senator.

Senator THURMOND. The Regional Information Sharing System is an important law enforcement assistance tool at the Department of



Justice. Do you support this effort to assist State and local law enforcement?

Mr. HEYMANN. Senator, I haven't looked at that at all. I am afraid I just have to say I just haven't looked at it. I would be happy to look at it with your interest in mind.

Senator THURMOND. In an article you wrote called "The Severely Defective Newborn," you stated at length the position that a newborn child should not be considered to be a human being. You state, for example, that the line defining when life begins for legal purposes could as logically be drawn at 2 weeks or 2 months after birth as at the moment of birth, and that such a definition might well be a wise decision. You also referred to the newborn child as merely a potential person.

Would you care to comment on this article, and do you still hold these views?

Mr. HEYMANN. Senator, I don't think that those were my views in the article. I think in the article—I could perhaps read from it. I refer to the principle grounded in basic social understanding that a person is defined once and for all at birth, and that one identified person's life should not be knowingly sacrificed for less than the life of others. And I think that was the position that I took in the conclusion of the article.

What I was doing was saying that there were two arguments, two schools of thought on what to do with infants newly born who had some severe physical defect. One school of thought said, well, it is all a continuation from conception on; and another school of thought says that at birth we have a human being and we have a human being that is as fully entitled to every right as any other human being.

I set forth the two, and then I made clear, Senator, I believe, that I believed the full rights at birth is the right answer.

I had a newborn grandson, Senator, 8 months ago. At 2 minutes or 2 hours, I would have given my life for that child.

Senator THURMOND. Now, but you wouldn't take the position that a newborn child is merely a potential person, would you?

Mr. HEYMANN. No, absolutely not. I think a newborn child is a full human being, Senator.

Senator THURMOND. Well, I am glad to hear you say that. That doesn't seem to be in the article that you wrote.

Mr. HEYMANN. Senator, the article suffers from an obscurity that makes it even difficult for me to read 15 or 20 years later.

Senator THURMOND. In other words, you didn't know what you were doing when you wrote that article?

Mr. HEYMANN. I knew what I was doing when I wrote it. I just don't know now what I was doing when I wrote it. [Laughter.]

Senator THURMOND. Earlier you mentioned programs being implemented by the mayor of Baltimore. It is my understanding that he also favors the legalization of drugs. I want to ask you this direct question: Do you support that position as well?

Mr. HEYMANN. No.

Senator THURMOND. Glad to hear you say that. Thank you very much.

The CHAIRMAN. Senator Metzenbaum? Well, first, let me ask, would the witness like to take a break now?

Mr. HEYMANN. I am anxious, Mr. Chairman, to show that I am as tough as the Attorney General. [Laughter.]

The CHAIRMAN. That is a test I would not willingly take, if I were you. But let me suggest what I hope, with the permission of my colleagues, would be the remainder of the game plan because everyone is using, as they should, their full 15 minutes.

I would intend, unless otherwise suggested, to go until 12:30 and break at 12:30 and reconvene at 2 o'clock. Now, that is an hour, which would give us four more people having an opportunity to ask questions this morning.

Both parties have their caucuses. There is a lot on the agenda in both caucuses. So unless there is objection, that is what I would propose. And if we go that route, we will have Senators DeConcini and Metzenbaum who would get to question, and then Senators Grassley and Specter would get to question before we recess at 12:30, reconvening at 2 o'clock.

Senator DECONCINI. I think Senator Simon was here before I was.

Senator SIMON. Mr. Chairman, unfortunately I have another appointment I am going to have to get to, so I will yield and come back after the noon recess to take my time.

The CHAIRMAN. OK; at any rate, let us proceed with Senator Metzenbaum.

#### OPENING STATEMENT OF SENATOR METZENBAUM

Senator METZENBAUM. Mr. Heymann, I am pleased to see you here this morning, and I am going to suggest to our very well-respected chairman that he arrange for the President and Mrs. Clinton to get to know a major member of their staff. I think that they ought to know you, and I hope that you will soon meet them. They ought to be very proud of the fact that you are on their team.

Mr. HEYMANN. I am sure I will, Senator Metzenbaum.

Senator METZENBAUM. The last three administrations neglected or opposed measures which could help stop crime before it occurs. I am talking about the Brady bill. I am talking about banning semiautomatic assault weapons. I am talking about drug treatment, increased support for programs like Head Start.

Instead, they had a different agenda. They focused chiefly on devising new ways to punish people after they committed crimes. The view seemed to be the only effective way to fight crime was to execute more people, jail more people, weaken constitutional safeguards that guaranteed due process and equal treatment.

This administration and this Department of Justice need to recast the political debate, in my opinion, so that it does not continue to be a contest over who is tougher or who can invent more new death penalties or more new mandatory minimum sentences. Obviously that road hasn't worked. It has been counterproductive. We have to put more thought and resources into preventing people from becoming criminals in the first place.

Let me ask you this specifically: There are many of us in the Congress who believe that we ought to ban semiautomatic assault weapons that serve no useful purpose except to mow down people in the street. I am not talking now about hunting weapons. I make

a total distinction. My question is: Do you have a position with respect to the matter of our banning semiautomatic assault weapons?

Mr. HEYMANN. Senator, I believe it is the President's position and the Attorney General's position that assault weapons, semiautomatic assault weapons, should be banned, and to the new boy on the block, it makes sense to me.

Senator METZENBAUM. And you share their view also with respect to support of the Brady bill?

Mr. HEYMANN. Yes; I am persuaded that the Brady bill will do a real good, Senator.

Senator METZENBAUM. What about trying to change the emphasis on just heavier criminal penalties and moving more to the question of dealing with problems that create crime in the first instance? Do you have any thoughts on that, Mr. Heymann?

Mr. HEYMANN. I think we have to do both, Senator Metzenbaum. I think in the most serious of crimes, we have to have very serious penalties. But I think we have to be prepared to try new things, and that means moving into the preventive realm. We have had the most serious penalties. We have more people in prison in the United States than anywhere in the world per capita, and we have to try—and we still have rapidly growing violence and drugs.

The answer isn't to go soft on bad criminals, but the answer is to add strings to our bow in the prevention area.

Senator METZENBAUM. The military-style arsenal of the semiautomatic assault weapons which were accumulated by David Koresh in Waco is the latest example of the inadequacy of our gun laws. If there hadn't been that arsenal, there would not have been the standoff and it could not have occurred.

For 4 years, a number of Senators have been trying to do something about semiautomatic assault weapons, and, in fact, in 1990 we passed a watered-down assault weapons proposal.

Part of the problem came from a lack of leadership at the White House. President Bush banned the importation of semiautomatic assault weapons, but he continued to permit the domestic production of these weapons. That was about as illogical a position as you could possibly have arrived at, and it certainly defied all logic and common sense.

I think that if we are to pass legislation of that kind, it is going to take a united effort on the part of the administration as well as those in Congress. And it is my understanding that you, the Attorney General, and the administration are prepared to support such an effort.

Mr. HEYMANN. Yes, sir.

Senator METZENBAUM. A Legal Times article dated July 20, 1992, highlighted how the Department of Justice Environmental Crimes Section undermined Federal enforcement of environmental laws. The article cited one case involving a pesticide company in Washington State that was charged with the illegal storage, handling, and disposal of hazardous waste. The alleged wrongdoing apparently may have contributed to someone's death, yet the Department of Justice let the company off with a minor fine. The Department of Justice did this over the vehement objections of State prosecutors and the EPA, which argued for tougher sentencing.



The article also mentioned the favorable treatment which the Department of Justice provided a big corporation compared with that of a smaller firm charged with similar water pollution crimes. The Department of Justice sent the head of the small company to jail for 3 years, but allowed the large corporation to settle the case for \$500,000.

How will the Department of Justice reverse this trend of sweetheart deals, political favoritism, and aggressive enforcement of violations of our hazardous waste, clean water, and other environmental laws? I think we are going to see more and more court cases having to do with the environment and the failure to abide by laws in that area. Do you have any views on the subject?

Mr. HEYMANN. I know nothing about the particular cases, Senator Metzenbaum, but I know that the Attorney General, Webb Hubbell—if, as I very much hope, he is confirmed—and I want to take very seriously bad environmental crimes. Mr. Hubbell and I have already agreed that, although he has the Environmental Division under him, we will both work on environmental crimes and we will both work on civil rights crimes. So we will consider it a very serious matter, Senator Metzenbaum.

Senator METZENBAUM. Good. Last month I chaired a hearing for the Judiciary Committee on innocence and the death penalty. The committee heard testimony from two men, Walter McMillian and Randall Dale Adams, both of whom had spent years on death row for crimes which they did not commit. One of those men, Mr. Adams, came within 72 hours of being executed.

Earlier this year the Supreme Court decided the case of *Herrera v. Collins*. The Court held that the Constitution does not require that a hearing be granted to a death row inmate who has newly discovered evidence which, if proven, could establish his innocence. I am frank to tell you I was shocked by the Court's ruling in the *Herrera* case. I think it significantly increases the chance that innocent people will be executed.

I introduced legislation to overturn the decision. When a death row inmate comes forward with reliable new evidence which casts serious doubt on whether the Government is executing the right person, do you think that a court hearing should be allowed that individual in those circumstances?

Mr. HEYMANN. Senator, I haven't read the *Herrera* case. I would like to read the *Herrera* case.

I do think that wherever there is a question of innocence, the country and the criminal justice system—a legitimate, serious question of innocence, the country and the justice system pay a great cost by not taking that very seriously, by not giving it every possibility. And that is one reason why I think it is very important that we provide adequate defense in all capital cases from the State.

Senator METZENBAUM. As you well know, it is very often difficult, if not impossible, to provide the accused with adequate defense. Sometimes it is a lack of funds. Sometimes it is a lack of concern. And in all fairness and reality, too often the African-American members of our community who have been subjected to prosecution, many of whom rightfully so, many of whom not so rightfully so, have been disproportionately executed, some cases in which peo-

ple have gone back later and found out later that there is no question the individual was innocent. Somebody else came forward and admitted their guilt after the execution had occurred.

I think that there is a responsibility to administer the law and mete out justice fairly, but I think the question of meting out justice fairly falls on both sides of the coin; that is, it is important that those who are guilty receive the appropriate penalty, but that those who aren't guilty, I think we in society have an equal obligation to see to it that they are accorded justice.

I look forward to working with you. I am certain that your long record in this area will be helpful and understanding, and I look forward to working with you in this area. Thank you. Thank you very much.

Mr. HEYMANN. Thank you very much, Senator. I certainly agree with what you just said.

Senator METZENBAUM. Thank you.

The CHAIRMAN. Thank you.

Senator Grassley.

### OPENING STATEMENT OF SENATOR GRASSLEY

Senator GRASSLEY. Well, congratulations on your appointment, and I appreciate the opportunity to be able to discuss some issues with you, and I particularly thank you for coming to my office to visit on some things.

I think I am going to touch on some other issues, now that we have had a chance to visit very generally in my office on things that interest me. I thank you for your interest in those things as well.

I want to talk about the Foreign Corrupt Practices Act. It is my understanding that you had a major role to play in the passage of that legislation when it was passed during the Carter years.

I share your concerns about American companies improving their competitiveness in the world markets through the payment of bribes to foreign officials. This competitive edge often comes at the expense of honest American companies whose better products might otherwise prevail in the free marketplace.

Now, speaking to the interaction of the Foreign Corrupt Practices Act and its application to what might be called cargo preference—and this was the subject of a hearing last week in the House Appropriations Committee—there have been reports that the American maritime companies who have shipped cargo to Russia have bribed Russian port officials in an effort to get their products through. Of course, this is a concern not only because of the moral and criminal issues involved, but because of our own cargo preference laws, which in turn require the United States Government to ship its foreign aid to Russia on American ships. And this is all part of President Clinton's effort to get aid to Russia. They have to ship cargo on American ships even though American ship prices are much higher than prices charged in the competitive world market, sometimes 3 or 4 times higher than other flag carriers of other countries.

If American flag carriers are factoring bribes into their cost, it is the American taxpayer that is indemnifying the bribers.



Now, if these reports are, indeed, true—and, of course, they were the subject of this hearing—I would like to know if you could assure me that the Justice Department would investigate the possibility of bringing criminal charges against any American marine carrier that is in violation of the Foreign Corrupt Practices Act.

Mr. HEYMANN. I think the answer to that question is yes, we would, Senator Grassley.

Senator GRASSLEY. This isn't a followup question, but just for my own information, do you have any doubts about whether the Foreign Corrupt Practices Act might be involved if the facts turn out to be as I describe?

Mr. HEYMANN. I do have some doubts, but I am worried about having them—I am prepared to now express them. I am worried about having them without the act in front of me.

Senator GRASSLEY. OK.

Mr. HEYMANN. I believe the act only applies to getting business and not to getting into the country. So I am worried that there may be a statutory—

Senator GRASSLEY. Let me then go on, and I appreciate that. I don't know whether any other act is violated, but it really bothers me when we have to transport on American ships at 3 or 4 times the world price. If it did factor in that the Russians aren't letting Americans dock, but allow other ships to dock ahead of them, then we have a long waiting period, which is bad for our economy, and it is bad for President Clinton's program. It is bad in a lot of ways. If any law might be involved, do you think this was an important enough issue to get into and maybe look at.

Mr. HEYMANN. I think it is very much an important enough issue to look at. It may be something that is best handled by going to the Russians and saying, "Look, if we are giving you grain, you have to make sure that your ports are fairly open to everybody".

Senator GRASSLEY. Yes, OK. On the question of something you wrote in the Politics of Public Management:

No one in the White House or the Congress should have any direct contact with those in charge of an ongoing criminal investigation.

What safeguards would you institute as the day-to-day manager of the Justice Department to make sure that political figures do not have direct contact with people running a criminal investigation? And maybe before you answer that, there are closely related issues that you might also answer. Under what circumstances would it be appropriate for Members of Congress to voice their concerns to you about how particular prosecutions or investigations might be proceeding, and also what about contact with White House officials concerning a particular prosecution or proceeding?

Mr. HEYMANN. Senator Grassley, I too link the White House question and the congressional question. In both areas, I think the general rule which I hold very strongly is that in dealing with the specific investigation or a specific case, there should be as little, if any, influence from the White House and also from Congress as we can set up.

You asked how would we do it. I think the best way to do it would be for the White House—and I am only going to refer to the White House—to establish a system that only the President's counsel, other than the President and the Vice President, who I don't



think we should be making rules for in any way, only the President's counsel should communicate with the Justice Department on an individual case or investigation; and that if the President's counsel communicates, it ought to be only with the Attorney General, the Deputy Attorney General, or the Associate Attorney General, so that we don't have a lot of people making comments that a lot of line attorneys may not understand.

Now, when should even this take place—by the way, there may be a situation like the investigation of the Kuwait matter, the effort perhaps to attack former President Bush. In that situation, the Attorney General or I or the Associate Attorney General ought to be able to say, "yes," about this matter, the National Security Council can be in contact with the terrorism section of the Criminal Division. But always these two filters, the President's counsel and the three of us in the White House.

When should it ever happen? Because I can't say never. It is almost never. There has to be permissible contact through us, not otherwise, when there is a major national security issue involved. The Kuwait case is a very good one. This is an investigation on our part as to whether Iraqi agents were trying to assassinate President Bush. It is also a major foreign policy issue, so the National Security Council has to be involved. So there has to be an exception running through us for national security cases, and finally, although I think we should try to avoid it as much as possible, there are broad policy issues that sometimes arise in litigation, sometimes arise as part of litigation. If possible, we should try not to discuss them in the context of an individual case.

Senator GRASSLEY. Does your term litigation mean criminal and civil? Because I was asking more about the criminal aspect.

Mr. HEYMANN. Even in criminal cases, sometimes a broad policy issue will arise that it would be legitimate to discuss as a policy issue by Senators or Congressmen or White House people.

The one you brought up, Senator Grassley, seems to be entirely—seems to me an example, a very good example. What are we doing? What are we doing about cases where the Russian—I didn't know about this before you said it—make it difficult for our ships to come in without paying bribes? That is the type of matter.

Senator GRASSLEY. I assume, though, that the safeguards you prescribed for your relationship with the White House on a particular criminal investigation wouldn't be any lesser for contacts with Members of Congress?

Mr. HEYMANN. I think the safeguards should be very similar, Senator Grassley.

Senator GRASSLEY. In the last Congress, legislation was introduced which would allow convicted murderers to challenge their death sentences on the grounds of racial discrimination. Under the bill, the disproportionate application of the death penalty to racial minorities in society at large would prohibit the imposition of the death penalty.

Do you agree that this bill, if enacted, would effectively end the death penalty, and do you agree that race discrimination should prevent the death penalty only if a particular defendant can prove discrimination in his own case?

Mr. HEYMANN. Senator, I haven't thought long and hard about that at all. I am worried as to whether the bill could be handled in any effective way; in other words, whether it could be—whether there is a practicable, implementable way to handle that. So I have doubts about the proposal, Senator. But I would like to look at it for some length of time.

Senator GRASSLEY. Just so you know, if there is any criminal code reform legislation through, that is apt to be a part of it, I am sorry to say. So you are dealing with real bullets when you address that issue.

In *The Politics of Public Management*, you contrasted differences in the Justice Department in different administrations. One area that you mentioned was in the area of judicial selection. You praised President Carter for reaching out for female and minority judges. You wrote that:

Implicit in that decision was the notion that the judges' background have considerable influence on their decisions and that the law in the United States should reflect the life experiences of women and minorities.

By contrast, you wrote President Reagan's judges had "no wish to see the courts as activist champions of minorities, the poor, or the politically powerless."

Is that your view of the role of the Federal courts? If so, it sounds to me to view Federal judges as activist champions on behalf of certain groups in our society. And if that is your view, wouldn't it have judges injecting their own backgrounds into the findings of fact and the applying of the law? And if that is true, then hasn't the rule of law been replaced by a power struggle in which unelected judges impose their own preferred policy views?

Mr. HEYMANN. Senator Grassley, I intended to describe two separate views, and I intended to describe them as objectively as I could, not expressing a preference for one or the other, although I had worked for President Carter, obviously. And for teaching purposes, I wanted to make them as stark as possible. I wanted to hold them apart so that people could see both of them and respect both of them.

I hope I wrote it that way. In reality, obviously the two views come closer together than in my writing where I am trying to let people see both of them. I wasn't trying to express a preference for one or the other.

Senator GRASSLEY. What then is your view on a judge's role as per their own background? You might consider it a fact of life that people's backgrounds obviously have some impact upon them. To what extent should that override the application of specific facts to the law and the interpretation of that law or the applying of that law?

Mr. HEYMANN. I think that applying the facts accurately and fairly and applying the law as passed by Congress or as in the Constitution as objectively as one can in conscience apply it is the first and overriding obligation of a judge, Senator. I believe there will be times when background will come in because it won't be possible. But the first and overriding obligation, not so much in trials but on appeals, is to try to apply the law as the Senate and House passed it.

Senator GRASSLEY. I know that you weren't in place when the Department adopted their proposed budget. In fact, maybe very few of President Clinton's people were. But it provides significantly less money for prisons and prison construction in the coming year. You have noted the importance already of incarceration in fighting white-collar crime.

First, if prosecution and jail is a deterrent to white-collar crime, then doesn't it provide similar deterrence to violent crime?

Mr. HEYMANN. Absolutely.

Senator GRASSLEY. Then how do you reconcile the smaller budget for prisons with the need to prosecute and jail criminals?

Mr. HEYMANN. Senator, I think this administration will insist on enough prison cells for every violent and dangerous person that we can convict and for drug kingpins and for more, too. It is absolutely essential. It is fair, it is retribution, and it necessary as a prevention in the form of deterrence.

There is a growth program under way in the Federal prisons. The number of prisoners is, as you know, increasing very rapidly, and we will provide capacity for increased numbers of prisoners. How the exact figure of 20 percent less than President Bush had suggested is arrived at, I don't have any idea.

Senator GRASSLEY. I yield.

The CHAIRMAN. Thank you.

Senator DeConcini.

#### OPENING STATEMENT OF SENATOR DeCONCINI

Senator DECONCINI. Thank you, Mr. Chairman.

Mr. Heymann, let me just reiterate to make clear for the record your answer to Senator Hatch regarding the memorandum that was worked out when you were Deputy Attorney General under the Carter administration, that memorandum, I think, being dated June 24, 1980.

Did you say on the record or will you say on the record that this is the procedure that you intend, that the Justice Department intends to follow, assuming you are confirmed?

Mr. HEYMANN. I think that if I am to hold the job, if you confirm me, Senator, I had better make sure that the Attorney General agrees. But it looks to me like a very good set of procedures.

Senator DECONCINI. You have not discussed this with the Attorney General?

Mr. HEYMANN. I do not believe she has ever seen the document itself.

Senator DECONCINI. Do you have any reason to think she wouldn't accept this?

Mr. HEYMANN. I think she will agree to it, and I think we are talking about something that would be workable and sound.

Senator DECONCINI. And it is your recommendation that she do that?

Mr. HEYMANN. Absolutely.

Senator DECONCINI. OK. Now, Mr. Heymann, in the infamous case of *Inslaw*—which the House of Representatives has done, I believe, quite a thorough investigation of, and I have read parts of it—Attorney General Barr refused to appoint an independent coun-



sel to investigate this case. He did appoint a special counsel, Judge Bua, is it?

Mr. HEYMANN. Bua.

Senator DECONCINI. Bua, to review it. Do you know the status of Judge Bua's investigation or what the findings are?

Mr. HEYMANN. Senator, I haven't read the report. I know the report is in. I have seen it physically. I know that we are now making it available—I believe that we are now making it available to Inslaw's counsel so that they will have an opportunity to read it before it is made public.

Senator DECONCINI. Is it being made available to the House Judiciary Committee or anybody up on the Hill?

Mr. HEYMANN. To the best of my knowledge, it has not been made available to anyone on the Hill, Senator DeConcini. I could be wrong, but I don't think so.

Senator DECONCINI. Can you get us some information on that, please, when it would be available?

Mr. HEYMANN. Absolutely.

Senator DECONCINI. I am very interested in it as well, and I know without saying so that Chairman Brooks and others are very interested in it. This case is very disturbing from at least the House investigation. Now, they are not a criminal investigative agency per se, but having read and paid attention to it somewhat, it disturbs me greatly that, first of all, Attorney General Barr did not justify an independent counsel and, second, that it doesn't appear that anything is going to happen from some very dramatic evidence that was forthcoming in that investigation in the House.

I want to thank you for your clarification, Mr. Heymann, on the so-called Waco investigation. I share the same concerns that the chairman did, and I am not going to repeat those. But I am very pleased that the paper apparently had misquoted you, to some extent, on exactly how extensive that investigation would be, including interviewing the Attorney General, I take it. As you know, Secretary Bentsen has appointed a panel of three outside investigative consultants who are going to interview everybody—Mr. Higgins and Mr. Simpson, everybody who was involved in it. And I presume that is exactly what you anticipate here, that no stone is going to go unturned. And if something went wrong, it is all going to come out. And if it didn't, it is all going to be on the record so nobody is going to be able to say, oh, my gosh, you didn't want to interview Director Sessions because actually he was in New York at the time and didn't actually receive the telephone call, or vice-versa, as it relates to Ms. Reno.

Mr. HEYMANN. We will interview 900 people and right up to the top, Senator DeConcini. Everybody.

Senator DECONCINI. Thank you. I think that is really the best thing, and I join the chairman in his wanting to get it all out. I think the sooner the better. And if problems are there, problems are there.

You talked about community policing and the administration's 100,000 police officers. Have you discussed this proposal with the Attorney General or with OMB or with anybody on how it is going to be financed?

Mr. HEYMANN. No, Senator.

Senator DECONCINI. That is somebody else's problem?

Mr. HEYMANN. Well, I have been in place 2 weeks and 1 day, Senator, and I have been trying to learn an awful lot awfully fast.

Senator DECONCINI. It greatly concerns me that if you look at the law enforcement budgets that the President submitted here, there is a substantial decrease in the FBI, the DEA, the Border Patrol, Customs, the ATF, and INS. IRS I think is the only one that gets an increase. And then there is this effort that I support of 100,000 new officers on the streets. And I find it hard to rationalize. I find out, however, through our hearings in the Appropriations Committee that Director Panetta at OMB has the right to waive those reductions in any law enforcement budget by having the request and the justification from the law enforcement.

Have you had a chance to look at these budget requests at all in the law enforcement agencies under the Department of Justice?

Mr. HEYMANN. No, Senator DeConcini.

Senator DECONCINI. Would you do so?

Mr. HEYMANN. Yes.

Senator DECONCINI. And if you conclude that there is a need not to reduce those agencies, would you have any qualms about recommending that to Attorney General Reno requesting the waiver from the OMB Director?

Mr. HEYMANN. I would have no qualms recommending it to Attorney General Reno.

Senator DECONCINI. Thank you.

Now, Mr. Heymann, the disgraceful—I call it that—plea bargaining surrounding the *Manuel Noriega* case has been something that has troubled me immensely. Having been a prosecutor, I understand well and good the need to plea bargain, and I am not opposed to it per se. But that case plea bargained with Carlos Leider, and a number of other people. There have been plea bargains with Colonel Del Cid and in other cases, including Daniel Miranda, another infamous case. In the *Carlos Leider* case, who was convicted and sentenced to life plus 135 years, he stated that he was testifying in the hopes of winning a reduced sentence, allowing him to return to Colombia, and in return for testifying against Noriega, later was transferred out of our country's highest security in Marion, IL. The administration went along with Mr. Leider's wishes and brought eight members of his family to the United States to live under Federal protective services.

I am not asking you about this particular case because it has been entered into and completed. But I am interested in how you see how important it is to get, so to speak, a notorious criminal like Mr. Noriega. How far would you go? Would you consider going after one of the largest drug dealers and reducing the life sentence plus 135 years in order to get him to testify?

Mr. HEYMANN. Senator DeConcini, I would like, as you invite me, not to focus it on that particular case, but I am very worried on both sides, from two sides, about making very, very favorable deals with very, very bad people.

First, we shouldn't be letting very, very bad people out with short sentences; and, second, it casts doubt on their testimony. Even though it is all made public to the jury and the jury knows

what is there, a very, very favorable deal with a very bad person doesn't produce evidence that you are very proud of.

I think this is an issue that has to be looked at very hard.

Senator DECONCINI. The *Noriega* case is not now pending, is it?

Mr. HEYMANN. I don't think so. An appeal may be pending.

Senator DECONCINI. An appeal may be pending, yes. Very good. Also, you were involved, were you not, with the ABSCAM investigation?

Mr. HEYMANN. Yes, I was, Senator.

Senator DECONCINI. I know some of the background regarding your investigation. And one of the things that bothered me about it is that, if I am not mistaken, one member that now sits on this committee was found not to be involved although he went to a place where there was an ABSCAM plant or whatever you call them. And yet, unless I am incorrect, it was impossible under the Carter administration to get a letter exonerating that Senator after there was no indictment, no presentation, no investigation opened up.

Are you familiar with that type of operation that the Justice Department refuses to clear a public official or anybody else who may have been taken in on the net and then found to be totally innocent and having turned down taking any action?

Mr. HEYMANN. Senator, I don't remember why there was a failure to write such a letter. I remember there being issues about writing such letters. I think it is very important that a letter be written. And, indeed, I have seen, in preparing for these hearings, other occasions in which letters were written with regard to Members of the Congress.

Senator DECONCINI. I think in this case, thanks to the junior Senator from Arkansas getting on the floor of the Senate, I believe—my recollection is that he finally embarrassed the administration and the Department of Justice to write a letter for this fellow Senator. It is not my purpose to focus on this particular case, but it is my purpose to have a commitment from you, hopefully, that the Justice Department is not going to do that kind of thing. If somebody is not under serious investigation or a target or under any investigation, the fact that they happen to appear some place or somebody made some allegation that turned out to be groundless, the Justice Department is not reluctant, including the FBI or DEA or anybody else, not reluctant to so state.

Mr. HEYMANN. I will try very hard to make sure that happens, Senator. As you can imagine, the problem with—the only problem I could imagine with what seems to me a perfectly morally correct position that you are stating is in some trial context—but even if there is a trial context, I will try very hard to see that we do that.

Senator DECONCINI. Thank you. Now, also Senator Grassley asked questions about intervention of the White House. What do you think the policy should be in relating to Members of Congress? Let me give you just a hypothetical, and this is truly hypothetical.

If a Member of Congress calls, or his chief of staff or whoever, and asks about a pending case and they don't ask, "We want to know what you are going to do with it," whether or not you are going to proceed with nine counts or two counts, or whether or not you are going to go for the mandatory sentences under section 409,



or whatever it is—I can't remember—but just said, "Can you give me a summary of where you are on the particular case? And by the way, this is a constituent of mine" or "I have an interest in this person. I just want to know what are you doing with it."

What is the feeling from your perspective, Mr. Heymann, as to those type of inquiries?

Mr. HEYMANN. Senator, frankly I should say to you that I think that those are not wise and perhaps—they are not improper, but I think we should discourage them in every way we can. If it is a question of why has the case gone on so long or could you please, Mr. Heymann, try and see to it that this doesn't go on forever and there is a resolution one way or another, that may be different. But I don't think we should tell either the White House or Members of Congress or Members of the Senate about ongoing investigations, and I don't think we should receive advice about ongoing investigations or cases.

Senator DECONCINI. Well, do you think it is proper to ask the question of, "Can you tell us, is it true that the Justice Department has had this case for 6 months and won't resolve it one way or the other?" I get complaints from constituents. I have some right now regarding cases on the border, and they are not drug cases. They are other cases. They can't get an answer from the Justice Department. I have not made inquiries, but I am interested in knowing just exactly what you think is a proper way to find out why the case is not moving forward? And maybe there is a good reason, and maybe you don't even have to tell the reason, but you can say, "Yes, we looked at it, and we can't move it forward because we are having a witness problem" or "We are working on the case" or "There is an active investigation," or, "By God, Senator, you know, this case should be moved up on the docket here and given the priority, because it has been going on for a year-and-a-half."

Mr. HEYMANN. Senator, my answer would be that if it is a question of delay, if it is a question of time, if it is a question of why is this person subjected to such a long delay, I don't think there is anything seriously—I don't think there is any serious problem if you were to call me or Judge Hubbell, if we are confirmed, or Janet Reno. And we could very—and we could decide for ourselves whether it is appropriate to ask, and we would be happy to.

If it is a question of the merits of the case, the evidence, either urging or simply finding out about it, unless it is a broad policy issue separated in the discussion from the actual case, I don't think even we should be asked about it.

Senator DECONCINI. Thank you, Mr. Heymann.

Thank you, Mr. Chairman.

The CHAIRMAN. On that point, if I may, one of the things that we have found on this committee, as in other committees, is that all large Government agencies on occasion find that taxpayers are, to use the vernacular, "hung out to dry" and don't get decisions, whether it is the IRS, the Immigration and Naturalization Service, or the Justice Department. And as I understand your answer, it would not be inappropriate for this committee, for example, in its oversight responsibilities, to demand of the Justice Department an explanation as to why something that ordinarily would take months or a year is taking years or multiple years to resolve. Not

asking why you haven't resolved it, what the flash points are, but just to be assured that it doesn't get lost in the crack. Because, as you know from your experience, in U.S. attorney's offices, in Justice Departments, in all States and federally, things do get lost. They do drop through the cracks. And while they are dropping through the cracks, people are left out there hanging. Because once someone is indicted, until the matter is resolved—or once it is known they are under investigation, until the matter is resolved, they might as well be convicted in terms of how it affects their ability to conduct their lives.

Mr. HEYMANN. I think it would be entirely appropriate, Senator, for you to call me up or Judge Hubbell and——

The CHAIRMAN. I have never done that. I have no intention of doing it. But I want to make sure we understand what we are talking about.

Mr. HEYMANN. Simply to say it has come to my attention that there is a case that has been—an investigation that is public, it has been going on for some time. Sometimes our investigations aren't public. Now, that creates a serious problem. If there is a secret investigation, oftentimes people want to know about it. And if asked why is it going on so long, the answer might be, "Mr. Chairman, I can't tell you anything about that subject at all."

The CHAIRMAN. Right; the real dilemma is secret investigations that the press writes about.

Mr. HEYMANN. Are no longer secret.

Senator DECONCINI. Mr. Chairman.

The CHAIRMAN. But they are technically secret—if I can just finish this point. They are technically secret, and what happens is, if John Doe or Mary Smith is named by the press in the secret investigation, and it drags on, it creates dilemmas for John Doe and Mary Smith. But, at any rate.

Senator DECONCINI. Mr. Chairman, I just want to thank you for going even a little further than I did, and I apologize for infringing on the Senator from Pennsylvania. But to me this is a very important point, because that is what happens to real people out there. They will have an IRS audit turned over to the Justice Department, leaving the impression when it is turned over that there is going to be a criminal prosecution. And then they don't hear from somebody for 6 months. They go to the U.S. attorney in the district, and they say, yes, we are looking at it. You know, somebody has to intervene for them and say if you are going to do something, do it. But decide it.

The RTC was the worst example that I ever saw of people being told by the RTC that they are turning it over to the Justice Department to look at it, and then not hearing from the Justice Department, in one case a year. And the person is hung out there trying to get a lawyer to tell them. And I don't know what else to do when people come to me and want to say, you know, "What is going on, can you help me?" It seems like somebody has got to be able to focus on that at the Justice Department, at least to say, "Yes, we found the case, and, by God, it is a very complicated case, and it is going to take a year to make a decision." At least they know.

I am sorry, Mr. Chairman.

Mr. HEYMANN. If I may, I just want to be very careful I am not making too much policy while sitting here. I don't have any problem with the expression of concern: "My constituent calls me and says this has been a year and he hasn't heard anything."

There may be a problem that I have to think about and consult about with regard to a response. In other words, within the Department there is no problem whatsoever with your saying to me, "This has been going on forever. Will you please, Phil, try and see what you can do about just getting an action one way or the other? Indict him or don't indict him, but do something."

Senator DECONCINI. Exactly.

The CHAIRMAN. Right.

Mr. HEYMANN. I don't have any problem with that.

The CHAIRMAN. The only point I wish to make is that there is a distinction, it seems to me, between a U.S. Senator or someone from the White House calling up and saying, "Please don't indict John Doe," or calling up and saying, "Please, when you indict John Doe, indict him on only two counts instead of 20 counts," or "Please tell me where you are precisely in the investigation. Who have you spoken to?" All those things, in my view, are totally out of bounds.

Mr. HEYMANN. I agree.

The CHAIRMAN. I have never in 21 years ever contacted the Justice Department on anything that I am aware of relating to anybody under investigation. But, theoretically, I just want to make the distinction here between the role of the Congress and this committee as an oversight body in terms of whether or not power is being abused. Power is abused on occasion when individuals are ignored. That is an abuse of power. It is an abuse of power when someone is fingered, everyone knows there is an investigation, and then because it is not convenient or because it is forgotten or because it just doesn't get up on the agenda, that person's life is left out there to atrophy.

That is an abuse of power, in my view, as well as going after someone who is unjustifiably targeted. So that is the point. And I know of no example. I am not raising this in the context of what I think the separation of powers requirements are under our system, it is not inappropriate for this committee or an individual Senator to insist that something be moved on and/or an explanation given. Not the outcome, how to move, what precisely you are going to do or not do.

At any rate, I yield to the Senator from Pennsylvania.

#### OPENING STATEMENT OF SENATOR SPECTER

Senator SPECTER. Thank you, Mr. Chairman.

Before the Senator from Arizona leaves, I would like to pick up on the question which he has asked and which the chairman has elaborated upon to express my concern about the issues of Senators calling up the Department of Justice and your making policy in this confirmation hearing. I have the utmost confidence in the chairman of this committee, and if someone had asked me if he called up the Justice Department in 21 years, I would have ventured a speculation that he hadn't, just as he has confirmed it. But what I would like to see done is to have a Department policy in writing on this subject.



Mr. HEYMANN. I think you are absolutely right, Senator Specter, and I will move on that right away.

Senator SPECTER. This is the kind of colloquy which can lead to a great many requests coming in to Chairman Biden or Senator DeConcini or any of the rest of us, and you start to get to some tough lines to draw when you pick up the telephone and make a call to the Justice Department. And I think that is something where we ought to have the rules well established and in writing as to what ought to be done.

The CHAIRMAN. I think that is a good suggestion by the Senator from Pennsylvania.

Mr. HEYMANN. And I appreciate your suggestion, Senator Specter, because I think I was responding too quickly on the questions of delay. I think we have to look.

Senator SPECTER. Because it may be that the chairman would be an inappropriate funnel to have the matters go through to make an inquiry as to delay in consultation with the ranking member, but I would not like to see members of this committee or Senators generally picking up the phone and bringing up cases.

Some of us may know something about a specific case, but that is not in our oversight capacity. That is something that ought to be very, very carefully handled.

Let me pursue, as I had intended to before Senator DeConcini's inquiry, the responses you gave to Senator Grassley. I am similarly concerned about the White House, even if it is limited to the counsel, calling up the Justice Department, even if it is limited to the Attorney General, the Deputy, and the Associate Attorney General. I am also concerned about your statement that people don't make rules for the President and the Vice President, because I think we have to make rules for everybody.

My own sense is—and, again, I would like to see something in writing on Department policy—that any contacts other than the President with the Attorney General would raise a question in my mind. There are a lot of counsels to the President, and there are a lot of inputs to counsels to the President from the White House. I wouldn't feel comfortable in having the counsel to the President call up the Deputy Attorney General, your position if confirmed, and raise some sort of a question.

I think the President does have standing. He appoints the Attorney General, and he can fire the Attorney General. But I think even if it is the President, the contacts ought to be preferably non-existent, or if in existence, ought to be in a very, very tightly circumscribed manner.

I was a district attorney, and I wouldn't take calls from anybody about a pending case. I wasn't appointed, so it was a little different.

Mr. HEYMANN. Senator Specter, I agree so fully with what you are saying, and I appreciate so much your pulling me back, even on the questions of delay. I am very worried—nobody worries more about White House contacts and congressional contacts. Senator Hatch knows what difficulties I created for this committee even on closed cases, and those are much less serious than open cases.

If I may, the only time—I am really discussing two things. I am discussing a procedure to make sure that people don't get casual,

and that procedure involves the White House counsel and a handful of people. When you get to substance, I don't think that there ought to be—I think that the occasions on which there ought to be contact on an active case between the White House and the Department of Justice are extremely rare. But if I may, let me just tell you there are some examples. I gave one, which was the present investigation in Kuwait, carried out by FBI people. It is not a case. This will generally be investigations. It won't be cases.

The FBI people have been in Kuwait trying to find out whether Iraqi agents were trying to kill former President Bush——

Senator SPECTER. Mr. Heymann, that is more than an investigation. It is a case. It is a potential case.

Mr. HEYMANN. If you like——

Senator SPECTER. It is a potential case against a named individual.

Mr. HEYMANN. I have no objection. If we should call it a case, let's call it a case. But the information they get is obviously of great importance to the foreign policy community of the U.S. Government, too. And so we have to be able to make that available to the National Security Council, which is in the White House.

Similarly, if I may take another example, Senator Grassley said really I think you ought to be bringing more cases with regard to a particular type of agricultural shipment to Eastern Europe. That is the type of policy issue that the White House can properly raise. It is a policy matter. And it remains a policy matter even if there is a case of no particular interest to them that may be pending. Oftentimes there will be a pending case.

Just as it was appropriate for Senator Grassley to make the suggestion and for us to turn it down if we disagree, the White House can make policy suggestions about litigation strategy, not in an individual case, but across a range of cases, a matter of policy, and we can turn it down if we disagree.

Senator SPECTER. Well, Mr. Heymann, I don't agree with that. I do not agree that the White House can make policy recommendations. That is too broad. I think you have to specify who it is at the White House who has the standing to raise the issue on what kind of a matter and with whom.

When you talk about national security matters which impact on an investigation into a possible assassination of President Bush, the Attorney General sits on the National Security Council. If somebody has something to say to the Attorney General, there is a mechanism in place for that to be done.

But when you talk about policy of the Justice Department on investigations and the White House having standing, I would want to know precisely who can raise that question. And I would not want to see it broadly diffused.

Mr. HEYMANN. I don't want to see it broadly diffused either, Senator. I doubt if your adamanance about keeping politics away from cases and investigations is very different from mine. I have a record in that regard, and I am adamant about it. Whether it is the Congress or it is the President, I want no politics with regard to cases and investigations.

Senator SPECTER. Mr. Heymann, there are occasions when some of us in our individual capacities may know something about a

case. It may be perfectly within our rights to call up someone in the Justice Department and to make an inquiry without any suggestion that our status as a Member of the Senate has any special overtone.

We are individuals and we do have standing without any suggestion of political impropriety, but I would like to see you give us something in writing on the subject that we have discussed as raised by Senator DeConcini, the chairman, Senator Biden, and also by Senator Grassley, so that we can know what the rules are.

It may be that there may be an appropriate Senate role in helping determine the rules, or maybe there isn't. Maybe it is solely an executive matter. But I think it is something that we ought to see with precision and in writing.

Mr. HEYMANN. I think you are absolutely right, and I am glad to be doing it that way and not as I started to from sitting here during questions and answers. Thank you, Senator Specter.

The CHAIRMAN. If the Senator will yield on that point just for a moment?

Senator SPECTER. I do.

The CHAIRMAN. This issue of politics in setting priorities on broad-scale types of cases as opposed to an individual case, John Doe, is he indicted, what did you indict him for, when, how, why. Every U.S. attorney's office and the Attorneys General Office, all appointed, engage in politics. They make political judgments.

For example, in the Southern District of Florida, they sit and decide whether or not they are going to prosecute drug cases that have more or less than 1 kilo in question because of resources available to them. That is a political judgment. That should not be left to unelected officials.

Mr. HEYMANN. Many times—

The CHAIRMAN. All right? So if the President wants to pick up the phone and say, "I disagree with that policy of who you are going after," that is the President's right and, I would argue, obligation.

If I want to pick up the phone and tell him I think you are doing it the wrong way, not case-specific to an individual defendant but generic, I should. I have more of a right to do it than you do. You are elected to nothing. You are appointed. The Attorney General is elected to nothing. She is appointed. The President is elected. I am elected. You are not elected.

Now, if you ran for Attorney General and you were elected on your own right, then you can set policy. But let's not get carried away here about politics. If it is case-specific relating to an individual, that is one thing. If it is a policy judgment made on a generic basis, it is quite different. The last administration said basically that unless there was \$100,000 in controversy, we couldn't even get to the case in S&L fraud. That is a political decision, with a small "p". Decisions like that shouldn't be left to the Attorney General. If I don't like it, I am going to call the President, not you. And I hope the hell the President calls you.

I don't think you are disagreeing with us, but let's be careful here as we try to get a squeegie out here and clean the windshield that we make sure that politics in the broadest sense is not left to unelected, unresponsive individuals. You work for the President.



He hires you. He can fire you. I work for the people of Delaware. They hire and fire me.

Anyway, I thought I would just make that point. And I still like you. I mean, it has nothing to do with that. I like unelected people. [Laughter.]

Senator SPECTER. Well, dangerous as it may be, I want to register a dissent, Mr. Chairman.

The CHAIRMAN. That is why I mentioned it.

Senator SPECTER. I think that Senator Biden, as chairman of this committee, or any of us can give you our views on what policy ought to be and try to influence you, and I have a long list of questions to ask you on the Department's operation, because you are taking on a very, very important job, perhaps as important as any in the Government, because the Deputy has the day-to-day operation of the Department.

Senator Biden and I have had many discussions in the course of the past 12½ years, and a lot of them on long train rides. We commute to the same area, and there aren't too many points where we disagree. But we do from time to time, and when we have disagreements, they are usually doosies. But I wouldn't make the distinction between appointed and elected, and I would say that the Attorney General of the United States is charged with the responsibility to carry out the Federal laws. And I do think the President has powers with respect to the policy, which is an obvious statement. He or she has the power to fire him or her. But while the Attorney General is there, I think the Attorney General has the responsibility to carry out the laws.

The CHAIRMAN. If the Senator will yield for just one more minute on this? In response to him, the Attorney General has the responsibility to carry out the Federal laws, and we all know the Attorney General does not have the resources to carry out all the Federal laws.

Case in point: When you were district attorney—I won't say you. When the U.S. attorney in Philadelphia does not have the resources to prosecute every drug case, they make a policy decision whether or not they are going to prosecute someone with 1 gram or 5 grams of cocaine or a half a gram of cocaine. They set priorities.

This is about priorities, not whether or not they are going to enforce the law, but which laws are they going to enforce in what order. That is a political decision in the broadest sense of the word, with a small "p." That is what I am talking about.

The fact of the matter is there aren't enough prosecutors to go after every S&L case. The FBI has testified that they would need a thousand more people to do that job. They don't have a thousand more people because you and I can't convince this body to give them a thousand more people. So, in the meantime, they then make judgments. They say, OK, we are going to focus on people who we think defrauded the Government of \$1 million, and then we are going to move to people of \$150,000, or whatever the number is.

So it is not a question of whether or not you enforce the Federal laws. It is a question of priorities, and political decisions are made

within the context of the limited budgets you have as to what you do first.

We have had major discussions here when you were head of the Criminal Division before. Should we, for example, focus on white-collar crime or violent crime? You can't do both equally. Ain't possible. There are three felonies committed for every single police officer that exists in the United States of America. Do them all at once. You can't. That is a political decision and a decision that unelected officials should not make.

Anyway, thank you.

Senator SPECTER. I don't disagree with what Senator Biden, the chairman, has said, Mr. Heymann, about the priorities. They have to be determined. But it is not up to me as the Senator from Pennsylvania to call up the U.S. attorney in the Eastern District and give him ideas for policy. And we really need to focus—and I think this has been a very useful discussion, perhaps as useful as any that I have heard in a confirmation hearing for an Attorney General or a Deputy Attorney General. We have some in Supreme Court nominees which may be more important, or perhaps not. But I think we need to focus on the relative authority, and we have great confidence in our President. He is elected, he or she is elected. But when we take it beyond the Attorney General, I think we get into very, very deep waters, and I believe we would be well advised to think about it at some length, and you can be assured that Senator Biden and I—

The CHAIRMAN. On that I agree completely.

Senator SPECTER [continuing]. will talk about it a lot more, Senator Cohen and others, and try to reduce something to writing. And I am not suggesting you are going to get all that done between now and the time the committee votes on you or the time your name comes up. But on the fundamental question of who at the White House calls who at Justice, I would like to see that in writing.

Thank you, Mr. Chairman.

The CHAIRMAN. Our colleague from Maine has suffered through this, and our witness has enjoyed it. I have found witnesses in confirmation hearings always like to see Senators debate because it means they are not answering questions.

Mr. HEYMANN. You saw that?

The CHAIRMAN. I did, I did. But I thank you very much. It is a very difficult area, as I said. I always err on not inquiring, whether it is Justice or Commerce or any other place. But I do think it is very important we not set down rules that, in fact, essentially take the electoral process out of the mix on policy issues. And I don't think you think that either.

With that, we will come back, and our second questioner will be the Senator from Maine, in all probability, and the Senator from California, if she is the first one back, will begin the questioning when we return.

I thank you. We will recess now until 2:30.

Mr. HEYMANN. Thank you, Senator.

[Whereupon, at 12:34 p.m., the committee recessed, to reconvene at 2:30 p.m., this same day.]

## AFTERNOON SESSION

The CHAIRMAN. The hearing will come to order.  
I think our next questioner was Senator Simon.

## OPENING STATEMENT OF SENATOR SIMON

Senator SIMON. Thank you, Mr. Chairman. We welcome you here, Mr. Heymann.

First, I notice that you strayed from your prepared statement slightly. Your prepared statement said, "I have not made a secret of the fact that I was extremely happy to have been nominated," and in your oral statement you said, "I have not made a secret of the fact that I am extremely happy." What has changed your mood? [Laughter.]

Mr. HEYMANN. I think, Senator, it was largely the warmth of the welcome from this committee.

Senator SIMON. You are a diplomat. You should be in the Department of State rather than the Justice Department, clearly.

Let me just touch on a few things because most of the areas have already been covered, and I hope to use less than my 15 minutes.

First, you talked about police being on the beat. I spent part of Sunday afternoon in an area in Chicago called North Lawndale, which is not like Lawndale as my colleague, Senator Carol Moseley-Braun, can tell you. It sounds like a very pleasant area. It is a grim area of Chicago. They now have cops on the beat walking around in pairs, and it has made a real difference in that community. I just want to underscore that.

We have also been talking about violence, and I would like you and Ann Bingaman, assuming she is confirmed—I am sure she will be—to head the Antitrust Division, to take a look at whether the television industry can get together and establish standards on violence. We made a 3-year exemption. That expires at the end of this year. It is a somewhat technical area where the law is not very clear, at least not to us. And if we can resolve the problem just with an Attorney General's opinion, that is ideal. If it takes something more, then we will have to do more.

Let me just quote from a report that was published in the American Medical Association Journal in June of last year, research done by the University of Washington. The article says:

Long-term childhood exposure to television is a causal factor behind approximately 10,000 homicides annually. If, hypothetically, television technology had never been developed, there would be 10,000 fewer homicides each year in the United States, 70,000 fewer rapes, and 700,000 fewer injurious assaults.

That is a very powerful set of statistics. Even if you cut that in half or cut it by 90 percent, it is still a very powerful statistic. I am pleased the industry is starting to move in the right direction. We are going to have a meeting August 2 in Los Angeles called by the broadcasters and cable, and the movie industry is going to be attending. I hope we make some progress.

There has been some discussion of the death penalty. The death penalty—it seems to me the evidence is overwhelming—is a punishment we reserve for people of modest means. If you have enough money and hire the best attorneys, you never get the death penalty.



money and hire the best attorneys, you never get the death penalty.

What would be your reaction, even though you favor capital punishment, to some kind of a review process to make sure that there is adequate counsel in the case of capital punishment? There was an article in the Stanford Law Review suggesting that in a high percentage of cases where people had been executed, there was not adequate counsel. Give me your reaction.

Mr. HEYMANN. Senator, I am very much in favor of that. I have taken part in supervising a very careful review in a southern State of the representation in capital cases, and representation is very, very inadequate in many cases.

I don't think there is a respectable prosecutor in the country who wants a capital sentence unaccompanied by a vigorous, competent, determined defense. They want to win, but they don't want to win a capital case, no prosecutor wants to win a capital case because the defense has been inadequate. That is nightmare. That is not something you look forward to.

Senator SIMON. I appreciate that answer.

An area that I would ask you to take a look at is DNA standards. I held the first hearings in Congress on DNA. We got the first appropriations for the FBI. We are now at a point where standards need to be established. Just as with fingerprints there are established standards, and we need to establish those standards on DNA.

There are those who say the FBI is the right agency to do that. The Defense Lawyers Association says it should be HHS or some outside agency. I frankly don't care. I trust either agency. But I think this is an area where someone has to look at it, a decision has to be made, and we need to establish the standards.

Mr. HEYMANN. Yes, Senator.

Senator SIMON. Could you get back to me?

Mr. HEYMANN. It would be a pleasure to get back to you. I would want to check on exactly where we are on establishing standards, but I agree with you that it is a subject where we need standards. It is a complicated, complicated subject and a very important forensic technique. We ought to have standards.

Senator SIMON. I could not agree more. It is a very valuable tool, both to convict and prove innocence. But standards need to be established.

Then, finally, I appreciate your response to an earlier question that we rely more heavily on the Sentencing Commission and that we review the whole question of where we have mandatory sentences.

Just a few statistics: In 1970, we had 134 prisoners per 100,000 population. Today we are at 455. I believe the State of California may be above 600 right now. The second highest nation is South Africa, 311. Canada has 109.

We thought we were going to solve the crime problem or reduce the crime problem by imprisoning people, and it simply hasn't worked.

Now, there is no question we ought to be imprisoning career criminals. We ought to be imprisoning people who are a threat to society. But we ought to also be looking at alternatives and review-

ing mandatory minimum sentences where the evidence is, I think, fairly substantial that mandatory minimum sentences sometimes do a great injustice and are counterproductive. I am lobbying you on that one.

Then one final area, we mentioned gun legislation. This technically is not part of the Justice Department, but the whole question of how you become a gun dealer is important. The Washington Post had an article that in Detroit about a dozen gun dealers were involved in the sale of some 2,000 guns to criminals. It is an extremely easy thing to become a gun dealer. You send in \$30, fill out a very simple form, and you are a gun dealer for 3 years. You can sell them out of the back of your car. You can sell them anywhere. We clearly have to do better. So as you review gun legislation, this is an area that you ought to look at, too.

Beyond that, I have no questions, and I welcome you. I think you are going to do a very effective job for the Justice Department and for the Nation.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Brown. Senator Cohen, if not Senator Brown.

Senator BROWN. I would love to go ahead, but I think Senator Cohen was here before me.

The CHAIRMAN. Senator Cohen.

#### OPENING STATEMENT OF SENATOR COHEN

Senator Cohen. I thank Senator Brown for yielding, when he had to. [Laughter.]

No; thank you very much.

Attorney General Reno has testified before the committee that she would like to see violent criminals taken off the street and put in prison behind bars. Do you agree with that general proposition?

Mr. HEYMANN. Absolutely, Senator Cohen.

Senator COHEN. I want to give you a profile of someone and ask you for your opinion about this profile. The person had been arrested for theft, possession of a deadly weapon, rape, assault with a deadly weapon, robbery, possession of a prohibited weapon, destruction of movable property, simple assault, assault on a police officer, a holdup, violation of the National Firearms Act, robbery, assault with a deadly weapon, possession of a deadly weapon, possession of drug paraphernalia, possession of unregistered firearms, homicide, assault with a deadly weapon, unauthorized use of a vehicle, carrying a dangerous weapon, assault with intent to kill, assault on a police officer, escape from prison, and possession of a sawed-off shotgun, and armed robbery.

Does that match a profile of someone who should be taken off the streets?

Mr. HEYMANN. Yes, sir.

Senator COHEN. I ask you this question because I just recently acquired a copy of the book that you edited, "Assault with a Deadly Weapon." The profile is of Mr. John Allen, who I think would qualify as a career criminal. Yet in this book, in the preface that I read, you are fairly complimentary of this person as a human being. I think you even said, "I wanted to do everything I could to keep him out of prison."

Mr. HEYMANN. I was his defense attorney, Senator.

Senator COHEN. If you were a prosecutor, you would want to put him behind bars?

Mr. HEYMANN. Absolutely.

He is the person to whom I was referring earlier, who is now dead, Senator. But if I were a prosecutor, I would want to put him behind bars. You are tearing away at a friendship. If I were a prosecutor, I wouldn't want to handle the case myself. But if I were a prosecutor and I didn't know the man, or if I knew about him, I would want to put him behind bars.

Senator COHEN. The friendship came after the commission of all the crimes; is that not true?

Mr. HEYMANN. It grew out of representing him as a defense attorney.

Senator COHEN. Right. I must tell you I was somewhat surprised by the glowing terms in which you described him. I didn't see any condemnation of any aspect of the crimes that he committed but, rather, statements such as:

What is left, then, is John's world as he sees it. The crimes, the prisons, the relationship with the police are part of a well-organized world view that includes much else, the meaning of family, the requirements of self-respect, the roles of love and jealousy.

It was all quite laudatory of him as an individual, and I didn't see any reference to condemning the acts of violence that he perpetrated on quite a number of people.

Mr. HEYMANN. Senator, what you were reading was a description of the book. The book is—

Senator COHEN. No; I am reading your description of him.

Mr. HEYMANN. Well, I thought as you read it that it was a description of what the reader will get when the reader reads the book, which is a world through his view, a world through his eyes. If I am wrong, I apologize.

Senator COHEN. OK; let's assume that we have a similar case that comes to the Justice Department and we have a person that fits that particular profile.

Mr. HEYMANN. I would want to lock him up for a long time, Senator.

Senator COHEN. The mother says he is loyal to his friends, he is generous to his family, he has these core values, he has had a rough life, no father, and a variety of other problems. You would say, "Too bad?"

Mr. HEYMANN. Absolutely, Senator. And I have had a view on that for a long time, since I first met John Allen.

He was a dangerous man, and he had to be locked up as a dangerous man. That, however, doesn't mean that you couldn't think about and even understand how he got there, and think about ways that you can prevent other people from becoming the same.

But if I had to deal with him, he was a dangerous man and I would lock him up.

Senator COHEN. It comes back to the point, I think, that all of us are confronted with. How do we deal with those who grow up with the kind of values or lack of values that we think ought to be established?



Senator Kennedy pointed out earlier that studies have been done that say many of the people who we are talking about don't have fathers, and that may be a very large contributory factor. The family unit does not exist. In addition they don't have economic opportunities.

So we are faced with a whole generation of people who now find themselves in that position, and so we have to deal with that element, and we have to deal with the underlying social causes at the same time.

Mr. HEYMANN. Absolutely.

Senator COHEN. But you would agree that those who have reached the point not entirely through their own fault, nonetheless have to be put away?

Mr. HEYMANN. Yes.

Senator COHEN. They have to be put behind bars?

Mr. HEYMANN. Yes.

Senator COHEN. And those that we hope to save in the future, we have got to start dealing with the underlying causes?

Mr. HEYMANN. At 3 years, 4 years, 5 years, not at the age of 21, yes.

Senator COHEN. Prior to birth perhaps, right?

Mr. HEYMANN. Yes.

Senator COHEN. With prenatal care and—

Mr. HEYMANN. Yes, and once they are there, they are dangerous and they have to be locked up, Senator.

Senator COHEN. Fair enough.

I wasn't clear from your response to Senator Simon. Do you favor the death penalty or oppose it?

Mr. HEYMANN. I favor the death penalty in appropriate cases, that being very heinous crimes.

Senator COHEN. OK; are you familiar with the Supreme Court decisions in *McCleskey v. Kemp*?

Mr. HEYMANN. Yes, sir.

Senator COHEN. The Georgia death penalty law was upheld despite the statistical evidence that showed that defendants convicted of killing whites are 11 times more likely to be sentenced to death than those who kill blacks and other minorities, and the discrepancy is a lot higher when the killer is black and the victim is white. You are aware of that court decision?

Mr. HEYMANN. Yes, sir.

Senator COHEN. Some in Congress would impose a racially disproportionate pattern test where you have these death sentences. What is your view? What would you advice Attorney General Reno, if such a law were proposed and were to pass, as to whether or not the Attorney General should support such a provision?

Mr. HEYMANN. Senator, I testified a little earlier that I can't at the moment quite imagine how it would work. I think it is very serious that African-Americans as victims are taken considerably less seriously by juries, and I think it is a general—I don't think it is just Georgia. *McCleskey* took place in Georgia. I think it is a general thing.

I think that is a very serious problem that we have to take, we have to find a way of dealing with. But I am not at all sure that it can be done by demanding that more African-Americans, more

black Americans, be sentenced to death in order to even up the count with regard to victims, I am sorry. Let me state that again.

Senator COHEN. I think you had better rephrase that.

Mr. HEYMANN. Yes; most homicides by African-Americans are of African-Americans. Most homicides of every group are of other members of the same group. It is not an answer to the *McCleskey* problem to say that because—

Senator COHEN. The problem is that if you kill a white, you are 11 times more likely to get the death sentence than if you kill a black.

Mr. HEYMANN. And there is no easy way to figure out how to resolve that other than to prevent it in advance. There is no easy way to deal with the statistics.

Senator COHEN. So you would advise Attorney General Reno to do what? Come out in opposition?

Mr. HEYMANN. I would have to see what the proposal is, but I don't quite know how the proposal would read.

Senator COHEN. It is a little bit unfair of me to ask you this, so I will have to submit the legislation to you and ask you to look at it at that time.

Mr. HEYMANN. Yes.

Senator COHEN. Watergate tapes are in the news today, and, of course, they dealt with covert activities on a domestic level. But we also have to deal with covert action on an international level, and the fact is that a President has the option to pursue a covert action in order to pursue a legitimate foreign policy goal.

Now, a law was passed back in 1980 that said in almost every instance—and I think the chairman of the committee was then a member of the Senate Intelligence Committee—the President must give advance notice to the key Members of Congress, namely, the so-called Big 8, or at least the head of the Senate and House Intelligence Committees and the ranking members. He must give advance notice except in those extraordinary cases where the President must then give timely notification.

The Justice Department has interpreted that phrase, "timely notification," to mean whatever the President says: a day, a week, a month, a year. There is no limitation in terms of when the President has to notify key members of the intelligence community or the leadership of that covert activity.

What is your reaction to such an interpretation?

Mr. HEYMANN. Senator, I think that the Justice Department is at the moment looking at that very question, and I haven't read what we or they are coming up with. I have no doubt of the importance of the Senate in questions that bear on war and peace.

Senator COHEN. I hope you will take a look at that particular opinion.

Mr. HEYMANN. I actually have a document on it sitting in my office waiting to be looked at.

Senator COHEN. If you would because, if that is going to be the interpretation, I think it is one that is fraught with danger for the President to withhold notice until such time as he or she feels that is in the interest of Congress to know about it.

What is your opinion about independent counsel? Do you favor reauthorizing the law?

Mr. HEYMANN. I definitely favor it, Senator Cohen. I think it served the country very well. It really is an imposition on the people who are covered by it, the 50 or more. But it is an imposition that results in the Nation as a whole feeling confidence that its highest executive officials are not favored. And that is good for the country; it is good for an administration.

Senator COHEN. Thank you very much. We will have an opportunity to perhaps get more information on that as the legislation works its way through the House and Senate.

Attorney General Reno indicated during her confirmation hearings that one of the possible solutions to the problem that we are contending with, as far as habeas corpus reform is concerned, is to make sure there is a pool of competent defense counsels. Do you share that view?

Mr. HEYMANN. I do.

Senator COHEN. Let me just tell you that, notwithstanding the creation of a pool of competent defense counsels, one of the first things that anyone convicted of a crime will do is to file a complaint against the attorney for incompetent counsel.

Mr. HEYMANN. I believe that, too.

Senator COHEN. You believe that, too.

Mr. HEYMANN. Yes.

Senator COHEN. So the mere creation of a pool of competent counsels is really not going to deal with the fundamental problem we have of how to reconcile the need to assure that justice is being done and not delayed interminably, because there will be, in fact, challenges to the competency of that counsel on practically each and every occasion. It is the first petition that is filed once your former client has hit the prison.

Mr. HEYMANN. It will leave a procedural problem, but it will make you and I feel a lot more comfortable, Senator Cohen, if there are competent counsel.

Senator COHEN. Earlier today someone was talking about mandatory sentencing. I think Senator Simon mentioned this again just a few moments ago.

I have mentioned Senator Moynihan's article before. In addition to promoting your book, or the one you edited, I will promote Senator Moynihan's as well. He wrote an article called "Defining Deviancy Down." In this article, he points out that what we once considered to be deviant or unacceptable behavior is now treated either with indifference or resignation. And he went on to point out that the St. Valentine's Day Massacre, I think, involved three members of one organized crime group who killed four others, or four who killed three. I am not quite sure of the ratio—but it managed to make worldwide news.

That particular type of massacre today might end up on page 2—I am exaggerating slightly—of the Metro Section of the Post.

The CHAIRMAN. If the Senator would yield, it ended up on page 17 on St. Valentine's Day in the New York Times, where there were 13 family members killed, including 2 infants.

Senator COHEN. It makes Senator Moynihan's point about what we have done as far as defining deviancy down.

I think you also touched upon this. We are facing a serious crisis of how we handle crime. People are outraged. They don't feel safe



in their homes or on their streets. I just learned today, for example, that Senator D'Amato's son was assaulted over the weekend as he was going back to his college campus. He managed to survive with no serious long-term damage.

But, again, people are outraged that we have lost control of our streets, and that outrage, I think, has helped give rise to the call for mandatory penalties, because the people no longer trust the courts to impose the kind of tough penalties they want to see.

Now, most prosecutors, I think it is fair to say, and most courts, don't like mandatory sentencing. It takes away their flexibility. I am told that Federal judges in the Southern District of New York have refused to consider drug cases because they oppose mandatory sentencing.

I don't know what your reaction to that is, but, if I had a court who refused to consider a case because Congress had imposed a mandatory sentence, I would seriously consider having impeachment proceedings. If that is a law that Congress has mandated, Federal judges who are saying, "We don't like the mandatory provision," should undertake to come before the committee and say, "Chairman Biden, Senator Cohen, and other members, we think it is too harsh, it is inflexible, it is imposing penalties upon people we don't think belong in prison." To simply say, "We are not going to consider these cases," seems to me to be inconsistent with the position they currently hold.

I might be in error as far as being informed of what their attitude is, but it seems to me that the Justice Department should look into this and certainly bring some suggestion before the Congress if that proves to be the case. Would you agree with that?

Mr. HEYMANN. Senator, the two judges are, I think, both on senior status, which gives them some option to choose when they will sit and when they don't sit that no other judge has.

Senator COHEN. And if they choose not to sit because of the mandatory provision?

Mr. HEYMANN. I am not saying it is right, but what I am saying is that it is not a case in which a judge has said, "I will decide what cases I will sit in or not." I believe they are both in senior status.

Senator COHEN. Thank you for that clarification.

Mr. Chairman, my time has expired. Thank you very much.

The CHAIRMAN. Thank you, Senator.

I had the great honor of speaking at the third circuit judicial conference, and they are in the second circuit. But there were two judges on senior status, and under the senior status provisions, they don't have to hear any cases, so they can choose which cases they accept.

I made the same statement to 700 judges and lawyers assembled as the Senator from Maine just made, because it would be, I believe, at least theoretically, an impeachable offense not to handle cases. But they are in a unique status in that they are essentially retired and can pick and choose what cases they wish to take. But they did say that.

Senator Feinstein.

## OPENING STATEMENT OF SENATOR FEINSTEIN

Senator FEINSTEIN. Thank you, Mr. Chairman.

Mr. Heymann, I would like to begin by associating myself with Senator DeConcini's questions of this morning, particularly in reference to the budget items for the law enforcement departments. I am also on the Appropriations Committee, and I was very surprised to hear him say that they were cut. I would like to be informed, if you wouldn't mind, if that, in fact, is the case because this is sure not the time to do it.

Also, my interest is really about the streets, and since you are going to be the major law enforcement person in that Department in terms of line supervision, I have read your remarks and I know they are quite general on a number of subjects. So I would like to ask you five specific questions, if I might.

The first is: In my view, the appointment of a drug czar is not going to change anything, and I think maybe we have gotten into this nice wording of drug czars as solutions to problems. But let me ask you a specific question on drugs. What specific initiatives would you propose to combat the escalating violence of drugs on our streets?

Mr. HEYMANN. Senator Feinstein, if I may begin just by saying that I don't know whether a drug czar in general makes much difference or not. I know Lee Brown very well. I have worked in South Africa with him, and he will be a wonderful drug czar. I mean, his appointment will make a difference.

Senator FEINSTEIN. Great; I am eager to hear the specific programs.

Mr. HEYMANN. Well, I think that the program that is most recommended, if I can restrict myself to one, is the notion of taking people who are—as we know, many people commit either drug-sale crimes or burglaries or other crimes while using drugs. The association between other crimes and using drugs is very, very high, and that association being very, very high is important for two reasons: One, because it represents a big part of the market for drugs. The big-time drug dealers are making their money in an important way from people who are committing crimes, other crimes, and are using drugs. The other reason is because people do commit crimes in order to get drugs. So if we can break that relationship between drugs and other crimes, we are doing something very good.

I think that the most universal recommendation put forward for drug policy at this point is to make sure that parole after any sentence justified by deterrence or retribution is conditioned on twice-weekly—I believe that is the right amount—drug testing and that it be carried out rigorously. I don't think people can cheat if they are tested twice a week, and that the person be sent back to jail with absolute certainty for 1 month, 2 months, whatever it is, the minute they fail a drug test. They would be sent right back to jail and then let out after 2 months; and then if they fail it again, send them back immediately again.

I think that most people believe this will have the effect of getting them to stop using drugs; if you add a required treatment, that it will help, at least it will work while they are on parole, and that will make a dent in the crimes they commit and in the market for drugs out there.

Senator FEINSTEIN. Those are people who are using, not people who are just selling and not using.

Mr. HEYMANN. Those are people who are using.

Senator FEINSTEIN. Any specific programs for those who deal and don't use?

Mr. HEYMANN. Well, I think if they deal and don't use, we have to catch them and—well, I think we have to do two things. I think we have to catch them and lock them up. But there is one other thing that I think we have to do, and I think it is a serious program, Senator Feinstein. I think we have to—you know, it is hard to keep the conditions under which a market goes on. Buyers have to know where sellers are. Sellers have to know where buyers are. There has to be some—it is hard to keep a market. And the other thing we can do is break up markets.

In Tampa, they have gone around breaking up drug markets. In Houston, they announced that they are going to where drugs are sold. The police announced they are going to where drugs are sold on Wednesday. They announce in advance, "We are going to be there Wednesday." No one is there. They don't arrest anybody.

But the fact of the matter is they have broken up the market.

Senator FEINSTEIN. Then if I interpret this correctly—Senator Kennedy alluded to it this morning. Weapons as well as chemicals, such as acetone, which goes into the production of cocaine in Colombia, are exported from this country in significant amounts. I take it that your Department would take a good look at that and see if it is necessary to come up with some additional prohibitions on some of these exports.

Mr. HEYMANN. We will take a good look at it, Senator Feinstein. Senator FEINSTEIN. I appreciate that very much.

On April 24, 1989, you were quoted in the Los Angeles Times as arguing strongly against the then Attorney General's proposal that a coordinated Federal response to organized crime would be more effective if left within Justice than put directly under the administration of U.S. attorneys. And I would like to know how you see the strike force concept being used in the 1990's to be effective in dealing with organized crime.

Mr. HEYMANN. Senator, in general, I think the most effective way to get prosecutors to concentrate on a particular area is to assign them to give their exclusive attention to that area. It is also crucial if you want them to work with investigators, because then you can assign investigators to work on that area and you can put them all in the same building.

For that reason, I opposed the closure of the Organized Crime Strike Force when Attorney General Thornburgh proposed it. I am, however, told that it has worked well, and I don't think we ought to try to fix something that isn't broken. I am told that even the head of the Organized Crime Section in the Justice Department now, whom I admire very much, Mr. Coffey, says it is working all right, it is working just fine.

Senator FEINSTEIN. I am very pleased to hear that. Thank you.

Next question: Do you favor strengthening asset seizures and forfeitures laws, or do you believe they are adequate as they are? And would you see greater use of RICO statutes?



Mr. HEYMANN. I think asset forfeiture laws have been a remarkable success in many ways. They are, as you know, quite new. They are amounting to a substantial deterrent, and they are raising very large amounts of money, much of which is going back to police forces in the street.

They have got problems, I am told, that we are going to have to look at, but they are relatively minor compared to the usefulness of the concept and how well it is working.

Senator FEINSTEIN. So you would be supportive?

Mr. HEYMANN. I would be supportive—I am very supportive of asset forfeiture laws.

Senator FEINSTEIN. And the RICO statutes?

Mr. HEYMANN. Well, the RICO statute has been fantastically successful as a Federal criminal statute over the last—since about 1977. The problem that any statute has which has both criminal and civil, under which the same statute can be made the basis of a lawsuit or prosecution, there are a lot of complaints about civil suits under the RICO statute. I have no particular view on that. As a criminal prosecutive device, it has been wonderful, and it is copied by States and it is copied by foreign countries now.

Senator FEINSTEIN. I think they are two important tools against organized crime, organized drug dealing, as well as hitting the drug dealer where he lives, which is the money.

Mr. HEYMANN. Absolutely.

Senator FEINSTEIN. Let me go on to the next item, capital punishment. In response to Senator Thurmond's question early this morning, you said you agreed to capital punishment for "real bad crimes." And in response to a question asked a few moments ago, you said "certain heinous crimes."

As you know, the crime bill that this body will shortly be considering increases the number of Federal death penalty crimes, I believe to 52. Are you in support specifically of those increases?

Mr. HEYMANN. Senator, I quite honestly have not gone over the list of 52 or whatever number it is, and I would have to do that. I have not even looked at the list of 52 crimes.

Senator FEINSTEIN. Well, I would appreciate it, because I think, you know, "real bad crimes" and "heinous crimes" have to have some specific, tangible definition to them, and that is really where I am going and what I would like to know your views on, if you would.

Now, California today spends about \$300 million each year on the incarceration of more than 16,000 illegal alien felons, many of whom have previously been ejected from the United States and are back. I understand that Webb Hubbell would have the primary responsibility for immigration matters.

Mr. HEYMANN. Yes, he would.

Senator FEINSTEIN. However, I wonder if you have had an opportunity to formulate a strategy for improving the ability of Federal authorities to screen such offenders at the border. I would also like your thoughts on improving the strength, equipment, and effectiveness of the Border Patrol.

Mr. HEYMANN. I haven't had an opportunity to formulate a strategy, and it will be primarily under the associate. But I would be happy to work with him on it.

The number of illegal aliens, the percentage of illegal aliens in Federal prisons is also very high, and so I understand your point.

Senator FEINSTEIN. Not only that, in my State it is becoming a major issue. It is an issue, I believe, that unless we deal with it, there is going to be a terrible backlash, an unfortunate backlash, a wrong backlash, in the future because the State is economically stressed. It is a State with a high volume of new people. It is a State where, as I pointed out to you when we talked, anywhere from 3,000 to 5,000 people a night come over the border illegally. So the question of illegal aliens committing crimes, which I am also told is over 50 percent, many of the superior court county dockets in the southern part of the State, is a very real concern to people. It is up to this Government and this Department to control the border, I believe. So I am hopeful that INS and Border Patrol will assume a higher responsibility, or I should say higher level of concern in the Department.

Mr. HEYMANN. After we met, Senator Feinstein, I went back and made the point and had a discussion about it with Judge Hubbell. I will go back again, and we will be looking at it very seriously. As I mentioned to you, I have been over that border in a helicopter. It is a job, but it is a job we ought to be taking on.

Senator FEINSTEIN. Thank you very much. Thank you, Mr. Hubbell. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

Senator Brown.

#### OPENING STATEMENT OF SENATOR BROWN

Senator BROWN. Thank you, Mr. Chairman.

Mr. Chairman, earlier a member of our committee had made some comments about previous drug policies of administrations, referring to them as a "failed drug policy." I simply wanted to at least insert in the record one member's feeling that a policy that has resulted in a drop in usage of some of the drugs in this country, in my view, is not failed policy; that our purpose ought to be to reduce usage. I would hasten to add that we certainly need to do more. But it seems to me that that is the kind of observation that merited at least some response.

Mr. Heymann, I appreciate your being here. You have stood up admirably well for a process that is as close as this Congress gets to cruel and unusual punishment.

Mr. HEYMANN. Thank you, Senator.

Senator BROWN. I think we also appreciate people with your background being willing to serve in these offices. I think everyone on the committee is keenly aware that you take a significant pay cut by doing this, and we appreciate your sense of public service in moving forward.

I know you have had a great deal of exposure to the independent counsel statute. You have referred to it earlier today both in the remarks you have made as well as in response to Senator Cohen's question with regard to whether or not you would favor it. As I understood your answer, you do favor the reauthorization of the independent counsel statute?

Mr. HEYMANN. I strongly favor that, Senator.

Senator BROWN. And if I understand your background correctly, you were the one who prepared an amicus brief in defense of the statute.

Mr. HEYMANN. That is true, Senator.

Senator BROWN. My question, I guess, would be to inquire what your feeling is about making this statute apply to Members of Congress as well as the executive branch?

Mr. HEYMANN. I simply don't think it is necessary, Senator Brown. Over the years—and now it has been over the last 20, 25 years—the Justice Department has conducted a number of investigations involving Members of Congress. I don't think it has had any trouble bringing prosecutions when they were merited or, I hope, declining prosecutions when they were not merited.

It is also a source of some pride to the Justice Department, and I think it should be to the country, that we leave in the Justice Department cases where we are relying on a little bit of moral fiber and a little bit of personal backbone. We have that fiber and we have that backbone to handle cases involving Members of Congress, and I think it has been proved for 20 years. So I wouldn't include it.

On the other hand, I think there ought to be a provision in the bill, and I think there is likely to be one, that gives the Attorney General discretion in a case where she thinks there is a question, where she is worried about handling it within the Department, to appoint an independent counsel, and that could include Congressmen and Senators as well as anyone else.

Senator BROWN. Well, I would hope that you would give that some thought. I come down on a different side of that issue. Let me be specific.

At the time George Hansen was prosecuted for failure to properly disclose under our disclosure statutes, 23 other Members of the House of Representatives had done precisely what George Hansen had done and were not prosecuted. So you had one Member prosecuted for the same crime that 23 others were not prosecuted for at all.

At times, as you know, Congress has withheld evidence that could be relevant to a criminal prosecution relating to Members of Congress based on the assertion of separation of powers.

Those and other reasons, specifically the fact that Congress approves the budgets, approves the pay raises, approves staffing slots, and also approves Members for confirmation, at least has convinced me that there is a problem of conflict of interest here. I hope at least inasmuch as new problems arise you would keep an open mind on the proper way to pursue these.

I am appreciative of the statement you made earlier in this hearing about your willingness to take on people in power, and I admire that. But I hope you will not exclude Members of Congress as, I must tell you I believe, previous administrations have.

Mr. HEYMANN. I haven't in the past, Senator. I have not.

Senator BROWN. Thank you.

I know you have previously addressed in our discussions here some of the actions that came under your purview when you headed the Justice Department's Criminal Division. One particular one, questions involving Libya's attempts to bribe administrative offi-



cials, along with at least allegations about Mr. Vesco, had incurred the wrath or at least comments by the Senate Judiciary Committee in a report in 1982. And I know you have previously addressed that.

Do you have any additional thoughts you might care to make concerning the reason why the Justice Department declined to come up with \$435,000 additional money for this undercover investigation that had been requested by the U.S. attorney's office in New York?

As I understand it, the U.S. attorney's office in New York suggested that that money was needed to complete their undercover investigation. Who was it that made the decision not to come forward with that funding?

Mr. HEYMANN. The funding—by the way, Senator Brown, I think the amount was—harder to explain—\$23,000, not \$430,000.

The short answer is the FBI controlled the funds. It was FBI funds. However, the southern—I had a very strong relationship with the FBI, as I do to this day. I called in the FBI people at the request of the southern district people. Perhaps they were all there in the same room. I talked about what would be done, and I did not direct the FBI or tell the FBI that I wanted them to make the \$23,000 available.

The reason I didn't do that was because the FBI reported that the informant for the southern district, who they didn't trust, had just received \$150,000 from another source, and, therefore, it was not necessary for us to help him pay off a debt. This was to pay off a debt.

It is very hard to tell how much of it—I don't know whether the FBI's judgment of the informant Feeney was better than the southern district's or worse than the southern district's. I took the judgment of the FBI on the informant Feeney.

Senator BROWN. And the FBI's recommendation was not to provide that funding?

Mr. HEYMANN. Absolutely. They were adamant that they did not want to make the funds available, and I would have had to order them or get the Attorney General to order them to make it available.

Senator BROWN. If I recall correctly, there was a question as to whether Mr. Civiletti had made that ultimate decision or it had ultimately come to you, but—

Mr. HEYMANN. I am quite sure it was me who said the FBI doesn't want to do it and I am not going to direct them to do it.

Senator BROWN. One of the concerns that has been raised through this controversy was the treatment of Mr. Feeney and the question as to whether or not he should testify or bring forth information that he had. An allegation that appeared in the press was that Mr. Feeney had been threatened with a multicount indictment if he had come forward with this information.

Can you shed some light on that? Was Mr. Feeney threatened with an indictment should he speak out?

Mr. HEYMANN. Senator, a lot of this took place after I had left the Justice Department. The case was finally closed in 1982. I left the Justice Department in January 1981, so it was probably 1½ years later. I don't remember anything about it, and I suspect that

the reason I don't remember anything about it is whatever events there were would have taken place after I had left the Justice Department and probably Washington.

Senator BROWN. During the time you were in the Justice Department, do you recall any efforts that were made to suppress Mr. Feeney's testimony or to urge him not to speak out?

Mr. HEYMANN. I do not, Senator.

Senator BROWN. An example that you may well face as you are confirmed could well be allegations of insider trading against Mr. Hubbell that appeared in this morning's paper. I mention it not for the truth of those allegations. I don't know that they are true. But it does strike me as an example of an accusation against someone who will hold a very significant high government position.

Taking this situation hypothetically, would you share with us how you would handle it or how you would see it appropriate to handle an allegation of this kind against a high official?

Mr. HEYMANN. Senator Brown, I have to acknowledge that what I am about to say involves some personal feeling, too. I understand in the days before Attorney General Reno was before this committee, immediately before there was suddenly an allegation of some impropriety. Yesterday—

The CHAIRMAN. A number of improprieties.

Mr. HEYMANN. Yesterday I suddenly received—and there was a momentary panic, though I didn't feel it particularly in the Justice Department—a large pile of papers from Mr. John Nard asking to be a witness and allegations against me, which I regard as frivolous. And at the same time, Judge Hubbell received this letter.

I think if I were on the committee I would be very cautious about people who demand to be heard the day before a hearing and come up with brandnew allegations in the last 24 hours. But I like Mr. Hubbell very much. I believe in Mr. Hubbell very much. I don't like having it arrive on my desk yesterday. So there is a lot of personal in that.

Senator BROWN. I can appreciate what you are saying, and with regard to the Attorney General herself, it seemed to me at the hearings I had mentioned that the allegations that I was aware of were totally inaccurate and without merit, and I appreciated her response. I guess the substance of my question was: In the position you will hold, how will you handle allegations of this kind? In other words, will you attempt to investigate them and clear the air, or are there ones that you will not investigate? What will be your policy?

Mr. HEYMANN. I think with regard to allegations, Senator Brown, my policy in criminal cases will be, as it has to be with independent counsel cases, to see whether there seems to be a basis for it, see where it comes from, when it comes up, whether there is something that can readily be checked, whether it seems to be politically motivated. I think you have to look at all those things in handling particularly a midnight allegation.

Senator BROWN. I think the assurance the American people are interested in is, I think, that these things not be swept under the rug, and it seems to me you have addressed that with the previous responses you have given. My observation would be that people will want to know that things are not ignored.

Mr. HEYMANN. I think if I were in your place, Senator Brown, I would ask Judge Hubbell about that tomorrow, by all means.

Senator BROWN. Well, I am not focusing on Mr. Hubbell—this is a hypothetical. The name was an example. I guess my focus was someone who has a sensitive position such as you have, and I wanted some indication of how the Department itself will handle it.

Mr. HEYMANN. Well, I would explore it.

Senator BROWN. I think that is helpful. I have had a chance to read a few of your writings. You are very prolific and very readable, which is refreshing when one agrees with you and somewhat discomfiting when we don't. But I know you had written extensively about Judge Bork.

Tell me how you would compare Judge Bork and Justice Scalia in their view of the Constitution?

The CHAIRMAN. Throw him Brandeis while you are at it.

Mr. HEYMANN. Senator Brown, I think the question is too hard for me sitting here. I have no worry about offending either of them. I am an old friend of Justice Scalia. I don't know Judge Bork. But it really is just too hard. I wouldn't know what to say or how to begin.

Senator BROWN. I don't pretend to have a personal relationship with either one of them. But I guess I was interested in your comments about Judge Bork in describing his view of the Constitution as "a radical view." I was hoping you would share with us what aspects, what approach it was that he took that you viewed as a "radical" approach.

Mr. HEYMANN. That is easy, Senator Brown. I clerked for a very conservative and very great Justice: Justice John Harlan. Justice Harlan took precedent very seriously. He had a rule that after 6 months or after a year, a decision in an area of the law in which he had previously dissented as strongly as he could became law for him, and in the next case, he would apply the law. He gave it 6 months or something like that.

My criticism of Judge Bork in the piece that you have is that he had none of the respect for precedent that a truly conservative Justice should have.

Senator BROWN. Is that a quality, that respect for precedent, one that you feel ought to be used in looking for a new Supreme Court Justice?

Mr. HEYMANN. Again, I think respect for precedent is one of the things that has to be taken very seriously.

Senator BROWN. Thank you. Thank you, Mr. Chairman.

Senator FEINSTEIN. Mr. Chairman?

The CHAIRMAN. You didn't ask me the question.

Senator BROWN. I was afraid to ask you. [Laughter.]

Senator FEINSTEIN. Mr. Chairman, just as a matter of personal privilege, I was told when I concluded my remarks I said, "Thank you, Mr. Hubbell." I do know you are not Mr. Hubbell, so I apologize for that, Mr. Heymann.

Mr. HEYMANN. No, Senator Feinstein, I appreciate the chance. You are giving me an opportunity to say it is "high-man," not "hay-man."

Senator FEINSTEIN. All right. Thank you.



Mr. HEYMANN. Although it spelled h-e-y, it is "high-man."

The CHAIRMAN. Well, Webb—

[Laughter.]

You can call me Strom, if you would like.

Senator Moseley-Braun.

### OPENING STATEMENT OF SENATOR MOSELEY-BRAUN

Senator MOSELEY-BRAUN. I don't think so, Mr. Chairman. Your hair isn't red enough.

The CHAIRMAN. Ah, but we have similar problems. [Laughter.]

Senator MOSELEY-BRAUN. Mr. Heymann, first I would like to echo Senator Brown's remarks. It is a delight to have an individual of your caliber and stature prepared to serve in government, and particularly in an area as tough as our criminal justice system. This is, indeed, a welcome confirmation, and, in fact, I want to thank the chairman for the first noncontroversial nominee he has given me yet, and that is really very welcome in ways you will never know. Right, Mr. Chairman?

The CHAIRMAN. Senator, thank you for the reference. I wish I were the one giving you these nominees, but I get them given to me as well. But thank you, though, for the compliment.

Senator MOSELEY-BRAUN. You are welcome, sir.

I have a couple of questions. One of the other Senators asked the question about independent counsel for the Justice Department, and to my knowledge, Mr. Heymann, there has never been a woman or a minority member selected as independent counsel. I guess with regard to both the independent counsel issue as well as the U.S. Attorney's Office and the many offices that will fall under the Deputy Attorney General, I would like to talk a little bit about your own feelings and about diversity in our law enforcement and your commitment in that regard.

Mr. HEYMANN. Senator, I am deeply committed to diversity in law enforcement, in the Justice Department, in the FBI, in DEA, in the prisons—everywhere. I am committed to it not only because I believe in diversity as a very important part of our society in general, but because I think it is particularly important in the law enforcement business.

I think that this is the most diverse Justice Department that—I think this is already and will be the most diverse Justice Department that anybody has seen up until now.

Just as a point of correction, although I can't remember her name, I think we have had a woman independent counsel. But those people are, of course, chosen by three judges in the District of Columbia Court, not by the Justice Department.

Senator MOSELEY-BRAUN. To continue, with regard to the realignment of the functions under your auspices, you will have the FBI, the Drug Enforcement Administration, the Bureau of Prisons, Marshals Service, Executive Office for U.S. Attorneys, the Criminal Division, Office of Justice Programs, Interpol, U.S. attorneys, inspector general, Office of Professional Responsibility, Intelligence Policy Review, pardon attorney, Justice Management, Parole Commission, Solicitor General—

Mr. HEYMANN. Not Solicitor General.

Senator MOSELEY-BRAUN. Oh, that is what it says here.

Mr. HEYMANN. I don't think——

Senator MOSELEY-BRAUN. That is what it says here.

Mr. HEYMANN. I think when Mr. Days is up here, he will straighten me out on that.

Senator MOSELEY-BRAUN. Well, no, Mr. Colgate should be straightened out, because that is in his letter of May 14th.

Mr. HEYMANN. The Solicitor General will report directly to the Attorney General unless she is absent, in which case it would be me.

Senator MOSELEY-BRAUN. OK; well, I am sure Mr. Days will be happy to know that you said that, and maybe, Mr. Chairman, we might want to get back and have that brought to Mr. Colgate's attention.

In any event, with all of that, we are talking about a major coordination function, and I guess I want to get back to a point that I have made in these hearings before, calling attention to the importance of coordination, collaboration, and cooperation between the different aspects or different parts of our law enforcement mechanism. And so I would start with first your views about coordination with all of these agencies, and then, second, how you see coordinating with the 93 U.S. attorney's offices throughout the country. How do you see your role in terms of bringing these operations together so that they can act more efficiently, so they can act more effectively in concert with each other in this war on crime?

Mr. HEYMANN. I don't think I have any magic bullet, Senator Moseley-Braun, for coordinating, let's say, the FBI and the DEA. This has been a problem for a long time. What I do have is a strong sense that we have to solve that problem, that we have to do something about it. And that means working closely with the Directors and at the line level, and it also means trying our best to get clear what we want each of them to be doing.

Also, coordination will have to take place in all sorts of other areas. I agree with you. Those are large, independent, proud organizations which, if they are to be marshaled and brought to bear effectively on crime, have to work together. And that is not going to be easy.

With regard to the U.S. attorneys, I do have this to say: The Attorney General has arranged that she and I, and perhaps Judge Hubbell, meet each one of them as they are suggested by Senators and as their names come up. And I have by now met with a half a dozen or more. That turns out to be a very valuable way of starting the process of bringing together Justice and the field.

We talk frankly. I say, "What do you see the problem in Oklahoma to be?" And the candidate talks about it, and I talk about it. And then I say at the end, "I am going to be on the phone with you, and I hope you will be on the phone with me." That is a large part of it, because we, of course, want—we want Oklahoma City to attack the problems which are special to Oklahoma, as well as carry out Justice policies.

Senator MOSELEY-BRAUN. I suppose, though, you know—and I understand your response that it is not going to be easy, but I think we really do need, Mr. Heymann, to explore this issue a little further. It is an area the Vice President—Vice President Gore has

taken on the issue of what is called reinventing government, in large part because I think there is so much frustration in the public that so much money is being poured into these various law enforcement agencies and people don't feel any safer. If anything, they feel that it is somehow lost in the bureaucracy, all of these resources are lost in the bureaucracy, and they don't translate from being a part of these offices to actual law enforcement efforts happening at the ground level where people live, in their communities, and making them feel safer or feeling that the resources have been well spent.

So I guess if I would urge you to do one thing in particular, it would be to—you have got a lot on your plate here with all of these different offices. It would be to undertake to set up a task force or a group or a working group, or whatever your approach would be, to have someone look at coordinating these offices. You are right. There have been standoffs for a number of years between some of them, to look at issues going to budgetary reform, going to functional coordination and reformation and reform and the like in these agencies so that we can begin to stand up and tell people that these agencies really are doing the best possible job and the most efficient job with the resources that we give them.

Mr. HEYMANN. I promise you we will do that, and very soon.

Senator MOSELEY-BRAUN. Excellent.

To take it one step further—and I don't know if there were any questions asked earlier around the issue of community policing, but certainly bringing law enforcement down to the local level and support for law enforcement efforts at the local level is an area that I think, again, the people care a lot about.

I had occasion to ask Attorney General Reno about community policing. Since this will be directly in your line of responsibility, I would like to explore your feelings on this issue or this initiative.

Mr. HEYMANN. I think community policing is the most important single development in law enforcement in at least a decade, and I think that, if done well, it can make all the difference in the world. It can turn policing into something far more effective by bringing the community to the side of the police officer.

I think policemen believe it, and I think they are supportive of it, and I think we in the Department of Justice should do everything we can to push, gently, police in that direction.

Senator MOSELEY-BRAUN. I couldn't agree with you more. Again, in my background, in the old days, we used to call them the beat cop approach. You would have a policeman who was part of the community being involved with that community in law enforcement. And we have lost that, and I think getting back to it is a very important direction for us to take.

To go one step further, one of the other aspects of community policing that makes it so attractive is the notion that it will help us to prevent crime before people are victimized, prevent crime before it happens, and thereby help make our communities safer. And in that regard, there are a number of other related issues having to do with, on the one hand, pretrial diversion and, on the other hand, community-based rehabilitation.



Have you any thoughts about the specific approaches to crime prevention and relieving our reliance on prisons as our only alternative for addressing criminal justice?

Mr. HEYMANN. I think we are going to have to look at alternative punishments, and I think that community involvement in that is essential. I think if we want community cooperation, we need not only community policing—I think if we are going to deal with crime, I think we need community cooperation. We can't just say to police, "You solve the crime problem." I think if we are going to get community cooperation, we need police that work with the community in the community, that the community feels belong to them, and I think we also have to find alternative sentences in appropriate cases—not for the worst criminals, not for the very bad criminals, but alternative sentences which are community-supported.

Senator MOSELEY-BRAUN. All right. Thank you, Mr. Chairman. Thank you very much, Mr. Heymann. I look forward to supporting your nomination.

[The prepared statement of Senator Moseley-Braun follows:]

#### PREPARED STATEMENT OF SENATOR CAROL MOSELEY-BRAUN

CONFIRMATION HEARINGS OF PHILIP B. HEYMANN, WEBSTER HUBBELL, AND DREW DAYS  
III—MAY 18–20, 1993

Mr. Chairman, over the past 12 years the Department of Justice, once one of the proudest departments of our Nation's Government, has become a sad shadow of its former self, plagued seemingly at every turn by accusations of politicization, cronyism, ideological bias, and simple mismanagement.

As a former Assistant United States Attorney, I have been deeply troubled as I have watched the rapid decline of the department I once loved so much. I was heartened to see that President Clinton has made restoring the credibility of the Department of Justice one of his top priorities, and in my opinion he could not have gotten off to a better start than by naming Janet Reno as Attorney General. In the few short weeks she has been in office, Ms. Reno has impressed Americans across the country with her courage, commitment, and compassion, with her intelligence and with her integrity.

But Janet Reno cannot do it alone, Mr. Chairman. The Justice Department is a massive and often unwieldy bureaucracy, with 80,000 employees and an annual budget of more than \$10 billion. Over the next three days, this committee will hold hearings on the nominations of Philip Heymann, Webb Hubbell, and Drew Days, the three men who as Deputy Attorney General, Associate Attorney General, and Solicitor General will be responsible for the most important functions of Janet Reno's Department of Justice.

These three men bring an extraordinary wealth of experience—in all levels of government, in academia, in the private sector, and in public advocacy organizations—to the posts for which they have been nominated. I know that they are capable of the task before them. Let us use these hearings to ensure that they understand the magnitude of that task. Let us use these hearings to make sure that they understand that as guardians of the public trust, they must uphold the values of justice and equality in every aspect of their lives.

Above all, Mr. Chairman, we are a nation of laws. I believe that the Justice Department can and must restore its reputation. I believe, as you do, that there should be only one law for all Americans—the weak and the powerful, the rich and the poor. These three nominees can make that ideal the reality. I look forward to hearing their plans for doing so.

Mr. HEYMANN. Thank you, Senator.

The CHAIRMAN. Senator Pressler.

#### OPENING STATEMENT OF SENATOR PRESSLER

Senator PRESSLER. Thank you very much, Mr. Chairman.

I have just completed a meeting with our State Governor, Governor Miller, who just succeeded to the governorship because of the tragic death of Governor Mickelson. We were talking about the Indian jurisdiction problems we have in South Dakota, and, of course, you will be one of the two or three key people nationwide dealing with this situation.

I think Governor Miller was speaking for many States when he said he strongly felt that there should be more consultation between the States and the Justice Department before suits are brought in the area of Indian matters.

Also, many tribal leaders—I have an annual meeting with my Indian tribal leaders in South Dakota; I work very closely with the tribes—have had the feeling, a strong feeling, that they learn of important developments too late. So, in other words, there seems to be a problem of consultation or communication here, and I am sure some of it is unavoidable, and I am sure everybody is for more consultation and communication.

But the point I am making is that somebody at the Justice Department at a high level has to take the subject of Indian country under his or her wing. I am not for any more studies or any commissions or any working groups or anything like that. But I am wondering, have you had experience in this area? It seems that the States in the West, at least, get into difficulty with the Justice Department in the area of Indian law in Indian country, as it is called. What are your intentions regarding having better consultation with the States? They feel a lot of these matters could be solved without lawsuits. I don't know if they could be or couldn't be. Maybe they can't be.

Mr. HEYMANN. Senator Pressler, I have no experience in the area at all. I have heard complaints like that before. I think this will largely fall under the immediate supervision of the Associate Attorney General, not of me. And what I would like to do is simply take the question back and take the suggestion back that we should be sure that we have somebody—not a commission but somebody—who is going to take this very seriously.

Senator PRESSLER. Yes; the Indian tribes at all the national meetings I have attended feel this way: The Department of the Interior is their trustee, and the person who is responsible for looking after their interests is the Secretary of the Interior. After that, it would be the Attorney General. They are looking for closer consultation.

Also, the non-Indians living on reservations, who own land nearby or who have businesses on reservations that are sometimes taxed by both the reservation and the county, have a great deal of confusion about where the tribal courts come in and where the State courts come in and where the Federal courts come in.

We really need someone at a high level to make their concerns a personal project. I would appreciate it if you would make that a priority at some point in your first year, because you would be the first person over there to do it in a long time. And there are a lot of people out there I would like you to meet—and I am sure you will—including some of the Indian tribal leaders when they are here. This isn't just an Indian concern or a non-Indian concern. Tribal leaders said their No. 1 problem on the Indian reservation

was law enforcement, which is the same No. 1 problem right up here on Capitol Hill where I live. The No. 1 problem in both places I would say is law enforcement or problems of crime.

So the problems are the same, and I would respectfully ask—and I am doing it on behalf of the Indian tribes and the non-Indians who live nearby, that somebody at the Justice Department make this a priority for a period of time this year.

Let me ask about the issue of crime, and I know you have covered that, but I will just ask you your basic philosophy. We have crime in my rural State. We also have crime problems in our urban areas. We have crime problems on the Indian reservations. There are basically two approaches people cite when they talk about solving crime. One is harsher punishment; the other, that we should solve the social problems; or they say we should have some combination thereof, and that would eliminate crime.

If you were to make a project out of ending crime in Washington, DC, how would you do it?

Mr. HEYMANN. Senator, it is one of the toughest places, Washington, DC. If you will allow me just to talk in general about what I think are the set of strategies that I would like to see us using in dealing particularly with violent crime, I think punishment as a deterrent is very important and I think it works. I have represented people who were tough street criminals in Washington, DC, and I have seen them change their behavior in the face of a threatened increased sentence for a particular type of crime. Unfortunately, they generally change it to a different type of crime. So deterrence is a prevention I would continue to use and take very seriously.

Senator PRESSLER. Do you believe the death penalty is a deterrent? Back in the 1960's, when I was in school, all the professors would say the studies all say the death penalty is not an effective deterrent. Now they are starting to say there are a lot of studies that show it is a deterrent.

Mr. HEYMANN. I am sure it must be a deterrent to some extent, but I haven't looked at the studies well enough.

Let me talk about some other forms of prevention, though. You mentioned, Senator Pressler, the age-old debate between deterrence or lock them up and changing the conditions that create criminals. Well, when one thinks of prevention, one begins by thinking about changing the conditions that create criminals. I think we should do that, but it is not the only way and it is a long and a hard way.

I think that a lot of violent crime takes place because we pay too little attention to relationships that are the source of much violent crime. Violence against spouses, domestic or live-ins, domestic violence, violence against children, I think we had better start taking those seriously. Violence between rival gangs, violence based on ethnic lines, these are all relationships where the way to prevent that type of violence is to start getting at the relationship.

I think there are situations that are particularly dangerous and we ought to watch those situations. They will help with violence, too. High-speed automobile chases often end in violence. We saw that in the Rodney King case. We see it in other cases. Certain en-



tertainment or sports events we have to watch very carefully, because they often end in violence.

I think it is important to reduce two commodities that have a lot to do with violent crime, drugs and at least assault weapons and weapons in the hands of the wrong people on the street. I think that arresting and incapacitating the most violent people is a very good way to do it. Of course, you do that when you adjust severe punishment, but I think identifying people who deserve to be in jail in either of two ways is a very important prevention. One, people who have long careers as criminals. Senator Cohen read me the career of a person I wrote a book about.

But the other type are the type that are young. It is hard, by the time you get a long career as a criminal, you are pretty well along in it. Younger people who are terrorizing a neighborhood, I think we ought to try to identify them and catch them while they are terrorizing the neighborhood and take them off the street.

Finally, I think that we ought to do everything we can to get the community involved in stopping crime in that community, because I think the only way the police can be effective is if the people in the community do two things: One, when Jimmy Jones goes out and starts behaving like a thug, a woman or a man grabs him and says, "Jimmy, what in the world do you think you're doing?" And he may be 8 years old or 9 or 10. And the second thing they have to do is, if Jimmy Jones is still terrorizing people at the age of 14, they have to help law enforcement deal with him.

Anyway, those are my set of recommendations on prevention.

Senator PRESSLER. I believe one of your fields at Harvard Law School was criminal law, is that right?

Mr. HEYMANN. That is correct, Senator Pressler.

Senator PRESSLER. I have been intrigued, and another Senator raised this question earlier, about the ABSCAM issue. Let me say that I don't bear any personal feelings here, because Judge Pratt and others wrote some wonderful statements about me which I think were maybe even a little excessive.

But the point is, in these types of operations where you have some people, who are totally unrelated to the taping, stumble onto the situation one way or another, how does the Justice Department, or how under our criminal law, can you protect those people until the time of the trial? I think that is probably one of the great questions in criminal law. I don't know whether you have any comments on that in general, or not.

Mr. HEYMANN. After ABSCAM, Senator Pressler, we set down to address that very question, because to have some kind of conman or outsider or government informer leading someone mistaken about what was happening into a situation, of videotaping an embarrassment seems to me to be an absolute outrage.

The way we addressed it was to say that it will be a requirement from now on, and that is since 1980, that no one would ever be invited into a situation—I should not be doing this orally without it in front of me, so please, it is in writing—into a situation where they could be embarrassed by being invited to participate in a criminal event of some sort, without our being satisfied that it has been made unmistakably clear in advance that what is to take

place is a wholly illegal, unacceptable corrupt transaction, no sloppiness.

Senator PRESSLER. Good. Yes; if you could submit that for the record, I would much appreciate it.

Mr. HEYMANN. I would be happy to.

[The information referred to follows:]

U.S. SENATE,  
Washington, DC.

For PHILLIP HEYMANN: Please provide me with a copy of the Department of Justice memo (circa 1980, post-ABSCAM) you referenced in my line of questioning stating Justice Department policy that public officials who are the target of sting operations will not be invited into a situation that could be potentially embarrassing unless the invitation is to engage in some activity that is clearly and unambiguously illegal.

LARRY PRESSLER,  
U.S. Senator.

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OFFICE OF THE DEPUTY ATTORNEY GENERAL,  
Washington, DC, June 21, 1993.

Hon. LARRY PRESSLER,  
U.S. Senate, Washington, DC.

DEAR SENATOR PRESSLER: In response to your request, here are the guidelines on the use of undercover operations by the Federal Bureau of Investigation.

If there is any other information you may require, please feel free to contact me.

Sincerely,

PHILIP B. HEYMANN,  
Deputy Attorney General.



Office of the Attorney General  
Washington, D. C. 20530

ATTORNEY GENERAL'S GUIDELINES ON  
FBI UNDERCOVER OPERATIONS

The following guidelines on use of undercover operations by the Federal Bureau of Investigation are issued under authority of the Attorney General as provided in 28 U.S.C. 509, 510, and 533. They are consistent with the requirements of the proposed FBI Charter Act, but do not depend upon passage of the Act for their effectiveness.

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#### RESERVATION

## INTRODUCTION:

The FBI's use of undercover employees and operation of proprietary business entities is a lawful and essential technique in the detection and investigation of white collar crime, political corruption, organized crime, and other priority areas. However, use of this technique inherently involves an element of deception, and occasionally may require a degree of cooperation with persons whose motivation and conduct are open to question, and so should be carefully considered and monitored.

## DEFINITIONS

An "undercover employee," under these guidelines, is any employee of the FBI -- or employee of a federal, state or local law enforcement agency working under the direction and control of the FBI in a particular investigation -- whose relationship with the FBI is concealed from third parties in the course of an investigative operation by the maintenance of a cover or alias identity.

An "undercover operation" is any investigative operation in which an undercover employee is used.

A "proprietary" is a sole proprietorship, partnership, corporation, or other business entity owned or controlled by the FBI, used by the FBI in connection with an undercover operation, and whose relationship with the FBI is not generally acknowledged.

## GENERAL AUTHORITY

(1) The FBI may conduct undercover operations, pursuant to these guidelines, that are appropriate to carry out its investigative responsibilities in domestic law enforcement.

Under this authority, the FBI may participate in joint undercover operations with other federal, state, and local law enforcement agencies; may seek operational assistance for an undercover operation from any suitable informant, confidential source, or other cooperating private individual; and may operate a proprietary on a commercial basis to the extent necessary to maintain an operation's cover or effectiveness.

(2) Undercover operations can be authorized only at the "full investigation" stage in Domestic Security Investigations.

AUTHORIZATION OF UNDERCOVER OPERATIONS

All undercover operations under these guidelines fall into one of two categories: (1) those undercover operations that can be approved by the Special Agent in Charge (SAC) under his own authority, and (2) those undercover operations that can only be authorized by the Director or designated Assistant Director, upon favorable recommendations by the SAC, Bureau headquarters (FBIHQ), and the Undercover Operations Review Committee. Undercover operations in the latter category are those that involve a substantial expenditure of government funds, or otherwise implicate fiscal policies and considerations. (Paragraph A). Also included in this latter category are undercover operations that involve what are termed "sensitive circumstances." In general, these are undercover operations involving investigation of public corruption, or undercover operations that involve risks of various forms of harm and intrusion. (Paragraph B). Of course, in planning an undercover operation, these risks of harm and intrusion will be avoided whenever possible, consistent with the need to obtain necessary evidence in a timely and effective manner.

A. Undercover Operations that May Not be Approved by the Special Agent in Charge because of Fiscal Circumstances

(1) Subject to the emergency authorization procedures set forth in paragraph N, the SAC may not authorize the establishment, extension or renewal of an undercover operation if there is a reasonable expectation that:

- (a) The undercover operation could result in significant civil claims against the United States, either arising in tort, contract or claims for just compensation for the "taking" of property;
- (b) The undercover operation will require leasing or contracting for property, supplies, services, equipment, or facilities for any period extending beyond the September 30 termination date of the then current fiscal year, or with prepayment of more than one month's rent; or will require leasing any facilities in the District of Columbia;
- (c) The undercover operation will require the use of appropriated funds to establish or acquire a proprietary, or to operate such a proprietary on a commercial basis;



- (d) The undercover operation will require the deposit of appropriated funds, or of proceeds generated by the undercover operation, in banks or other financial institutions;
- (e) The undercover operation will involve use of proceeds generated by the undercover operation to offset necessary and reasonable expenses of the operation;
- (f) The undercover operation will require indemnification agreements for losses incurred in aid of the operation, or will require expenditures in excess of \$1500 for property, supplies, services, equipment or facilities, or for the construction or alteration of facilities;
- (g) The undercover operation will last longer than 6 months or will involve an expenditure in excess of \$20,000 or such other amount that is set from time to time by the Director, with the approval of the Attorney General. However, this expenditure limitation shall not apply where a significant and unanticipated investigative opportunity would be lost by compliance with the procedures set forth in paragraphs D, E, F, and G.

B. Undercover Operations that May not be Approved by the Special Agent in Charge Because of Sensitive Circumstances

Subject to the emergency authorization procedures set forth in paragraph N, the SAC may not authorize the establishment, extension or renewal of an undercover operation that involves sensitive circumstances. For purposes of these guidelines, an undercover operation involves sensitive circumstances if there is a reasonable expectation that:

- (a) The undercover operation will concern an investigation of possible corrupt action by a public official or political candidate, the activities of a foreign government, the activities of a religious or political organization, or the activities of the news media;

- (b) The undercover operation will involve untrue representations by an undercover employee or cooperating private individual concerning the activities or involvement of any innocent person;
- (c) An undercover employee or cooperating private individual will engage in any activity that is proscribed by federal, state, or local law as a felony or that is otherwise a serious crime -- except this shall not include criminal liability for the purchase of stolen or contraband goods or for the making of false representations to third parties in concealment of personal identity or the true ownership of a proprietary;
- (d) An undercover employee or cooperating private individual will seek to supply an item or service that would be reasonably unavailable to criminal actors but for the participation of the government;
- (e) An undercover employee or cooperating private individual will run a significant risk of being arrested and seeking to continue undercover;
- (f) An undercover employee or cooperating private individual will be required to give sworn testimony in any proceeding in an undercover capacity;
- (g) An undercover employee or cooperating private individual will attend a meeting between a subject of the investigation and his lawyer;
- (h) An undercover employee or cooperating private individual will pose as an attorney, physician, clergyman, or member of the news media, and there is a significant risk that another individual will be led into a professional or confidential relationship with the undercover employee or cooperating private individual as a result of the pose;
- (i) A request for information will be made by an undercover employee or cooperating individual to an attorney, physician, clergyman, or other person who is under the obligation

of a legal privilege of confidentiality, and the particular information would ordinarily be privileged;

- (j) A request for information will be made by an undercover employee or cooperating private individual to a member of the news media concerning any individual with whom the newsman is known to have a professional or confidential relationship;
- (k) The undercover operation will be used to infiltrate a group under investigation as part of a Domestic Security Investigation, or to recruit a person from within such a group as an informant;
- (l) There may be a significant risk of violence or physical injury to individuals or a significant risk of financial loss to an innocent individual.

C. Undercover Operations that May be Approved by the Special Agent in Charge

(1) The SAC may authorize the establishment, extension or renewal of all other undercover operations, to be supervised by his field office, upon his written determination, stating supporting facts and circumstances, that:

- (a) Initiation of investigative activity regarding the alleged criminal conduct or criminal enterprise is warranted under the Attorney General's Guidelines on the Investigation of General Crimes, the Attorney General's Guidelines on Domestic Security Investigations, the Attorney General's Guidelines on Investigation of Criminal Enterprises Engaged in Racketeering Activity, and any other applicable guidelines;
- (b) The proposed undercover operation appears to be an effective means of obtaining evidence or necessary information; this should include a statement of what prior investigation has been conducted, and what chance the operation has of obtaining evidence or necessary information concerning the alleged criminal conduct or criminal enterprise;



- (c) The undercover operation will be conducted with minimal intrusion consistent with the need to collect the evidence or information in a timely and effective manner;
- (d) Approval for the use of any informant or confidential source has been obtained as required by the Attorney General's Guidelines on Use of Informants and Confidential Sources;
- (e) There is no present expectation of the occurrence of any of the circumstances listed in paragraphs A and B;
- (f) Any foreseeable participation by an undercover employee or cooperating private individual in illegal activity that can be approved by a SAC on his own authority (that is, the purchase of stolen or contraband goods, or participation in a nonserious misdemeanor), is justified by the factors noted in paragraph 1(1).

D. Approval by Headquarters (Undercover Operations Review Committee, and Director or Designated Assistant Director), with Concurrence of United States Attorney or Strike Force Chief, Where Sensitive or Fiscal Circumstances Are Present

The Director of the FBI or a designated Assistant Director must approve the establishment, extension, or renewal of an undercover operation if there is a reasonable expectation that any of the circumstances listed in paragraphs A and B may occur.

In such cases, the SAC shall first make application to FBI Headquarters (FBIHQ). See paragraph E below. FBIHQ may either disapprove the application or recommend that it be approved. A recommendation for approval may be forwarded directly to the Director or designated Assistant Director if the application was submitted to FBIHQ solely because of a fiscal circumstance listed in paragraph A(b)-(e). In all other cases in which FBIHQ recommends approval, the application shall be forwarded to the Undercover Operations Review Committee for consideration. See paragraph E. If approved by the Undercover Operations Review Committee, the application shall be forwarded to the Director or designated Assistant Director. See paragraph G. The Director or designated Assistant Director may approve or disapprove the application.

# E. Applications to Headquarters

(1) Each application to Headquarters from a SAC recommending approval of the establishment, extension, or renewal of an undercover operation involving circumstances listed in paragraphs A and B shall be made in writing and shall include, with supporting facts and circumstances:

- (a) A description of the proposed undercover operation, including the particular cover to be employed and any informants or other cooperating persons who will assist in the operation; a description of the particular offense or criminal enterprise under investigation, and any individuals known to be involved; and a statement of the period of time for which the undercover operation would be maintained;
- (b) A description of how the determinations required by paragraph C(1)(a) - (d) have been met;
- (c) A statement of which circumstances specified in paragraphs A and B are reasonably expected to occur, what the operative facts are likely to be, and why the undercover operation merits approval in light of the circumstances, including:
  - (i) for any foreseeable participation by an undercover employee or cooperating private individual in activity that is proscribed by federal, state, or local law as a felony or that is otherwise a serious crime -- but not including the purchase of stolen or contraband goods or making of false representations to third parties in concealment of personal identity or the true ownership of a proprietary -- a statement why the participation is justified by the factors noted in paragraph I(1), and a statement of the federal prosecutor's approval pursuant to paragraph I(2);
  - (ii) for any planned infiltration by an undercover employee or cooperating private individual of a group under investigation as part of a Domestic Security Investigation, or recruitment of a person from within

such a group as an informant, a statement why the infiltration or recruitment is necessary and meets the requirements of the Attorney General's Guidelines on Domestic Security Investigations; and a description of procedures to minimize any acquisition, retention, and dissemination of information that does not relate to the matter under investigation or to any other authorized investigative activity.

- (d) A statement of proposed expenses;
- (e) A statement that the United States Attorney or Strike Force Chief is knowledgeable about the proposed operation, including the sensitive circumstances reasonably expected to occur; concurs with the proposal and its objectives and legality; and agrees to prosecute any meritorious case that is developed.

(2) In the highly unusual event that there are compelling reasons that either the United States Attorney or Strike Force Chief should not be advised of the proposed undercover operation, the Assistant Attorney General in charge of the Criminal Division, or other Department of Justice attorney designated by him, may substitute for such person(s) for purposes of any authorization or other function required by these guidelines. Where the SAC determines that such substitution is necessary, the application to FBIHQ shall include a statement of the compelling reasons, together with supporting facts and circumstances, which are believed to justify that determination. Such applications may only be authorized pursuant to the procedures prescribed in paragraph F, below, whether or not consideration by the Undercover Operations Review Committee is otherwise required, and upon the approval of the Assistant Attorney General in charge of the Criminal Division.

(3) An application for the extension or renewal of authority to engage in an undercover operation should also describe the results so far obtained from the operation or a reasonable explanation of any failure to obtain significant results, and a statement that the United States Attorney or Strike Force Chief favors the extension or renewal of authority.

#### F. Undercover Operations Review Committee

(1) There shall be an Undercover Operations Review Committee, consisting of appropriate employees of the FBI



designated by the Director, and attorneys of the Department of Justice designated by the Assistant Attorney General in charge of the Criminal Division, to be chaired by a designee of the Director.

(2) Upon receipt from FBIHQ of a SAC's application for approval of an undercover operation, the Committee will review the application. The Justice Department members of the Committee may consult with senior Department officials and the United States Attorney or Strike Force Chief, as they deem appropriate. If the Committee concurs in the determinations contained in the application, and finds that in other respects the undercover operation should go forward, see paragraph F(3) and (4) below, the Committee is authorized to recommend to the Director or designated Assistant Director, see paragraph G, that approval be granted.

(3) In reviewing the application, the Committee shall carefully assess the contemplated benefits of the undercover operation, together with the operating and other costs of the proposed operation. In assessing the costs of the undercover operation, the Committee shall consider, where relevant, the following factors, among others:

- (a) the risk of harm to private individuals or undercover employees;
- (b) the risk of financial loss to private individuals and businesses, and the risk of damage liability or other loss to the government;
- (c) the risk of harm to reputation;
- (d) the risk of harm to privileged or confidential relationships;
- (e) the risk of invasion of privacy;
- (f) the degree to which the actions of undercover employees or cooperating private individuals may approach the conduct proscribed in paragraph J below; and
- (g) the suitability of undercover employees' or cooperating private individuals' participating in activity of the sort contemplated during the undercover operation.

(4) If the proposed undercover operation involves any of the sensitive circumstances listed in paragraph B, the Committee shall also examine the application to determine whether the

undercover operation is planned so as to minimize the incidence of such sensitive circumstances, and to minimize the risks of harm and intrusion that are created by such circumstances. If the Committee recommends approval of an undercover operation involving sensitive circumstances, the recommendation shall include a brief written statement explaining why the undercover operation merits approval in light of the anticipated occurrence of such sensitive circumstances.

(5) The Committee shall recommend approval of an undercover operation only upon reaching a consensus, provided that:

- (a) If one or more of the designees of the Assistant Attorney General in charge of the Criminal Division does not join in a recommendation for approval of a proposed undercover operation because of legal, ethical, prosecutive or Departmental policy considerations, the designee shall promptly advise the Assistant Attorney General and there shall be no approval of the establishment, extension, or renewal of the undercover operation until the Assistant Attorney General has had the opportunity to consult with the Director;
- (b) If, upon consultation, the Assistant Attorney General disagrees with a decision by the Director to approve the proposed undercover operation, there shall be no establishment, extension or renewal of the undercover operation until the Assistant Attorney General has had an opportunity to refer the matter to the Deputy Attorney General or Attorney General.

(6) The Committee should consult the Legal Counsel Division of the FBI, and the Office of Legal Counsel or other appropriate division or office in the Department of Justice, about any significant unsettled legal questions concerning authority for or the conduct of a proposed undercover operation.

G. Approval by Director or Designated Assistant Director

The Director or a designated Assistant Director shall have authority to approve operations recommended for approval by the Undercover Operations Review Committee, provided that only the Director may authorize a proposed operation if a reasonable expectation exists that:

- (a) There may be a significant risk of violence or physical injury to individuals;
- (b) The undercover operation will be used to infiltrate a group under investigation as part of a Domestic Security Investigation, or to recruit a person from within such a group as an informant or confidential source, in which case the Director's authorization shall include a statement of procedures to minimize any acquisition, retention, and dissemination of information that does not relate to the matter under investigation or to any other authorized investigative activity; or
- (c) A circumstance specified in paragraph A(b)-(e) is reasonably expected to occur, in which case the undercover operation may be implemented only after the Deputy Attorney General or Attorney General has specifically approved that aspect of the operation in accordance with applicable law.

#### K. Duration of Authorizations

(1) An undercover operation may not continue longer than is necessary to achieve the objective of the authorization, nor in any event longer than 6 months without new authorization to proceed.

(2) Any undercover operation initially approved by a SAC must be reauthorized by an Assistant Director or the Director, pursuant to paragraphs D-G, if it lasts longer than 6 months or involves expenditures in excess of the amount prescribed in paragraph A(g).

#### L. Authorization of Participation In "Otherwise Illegal" Activity

Notwithstanding any other provision of these guidelines, an undercover employee or cooperating private individual shall not engage, except in accordance with this paragraph, in any activity that would constitute a crime under state or federal law if engaged in by a private person acting without the approval or authorization of an appropriate government official. For purposes of this paragraph, such activity is referred to as "otherwise illegal" activity.

(1) No official shall recommend or approve an undercover employee's or cooperating private individual's planned or reasonably foreseeable participation in otherwise illegal activity unless the participation is justified in order:



- (a) to obtain information or evidence necessary for paramount prosecutive purposes;
- (b) to establish and maintain credibility or cover with persons associated with the criminal activity under investigation; or
- (c) to prevent or avoid the danger of death or serious bodily injury.

(2) Participation in any activity that is proscribed by federal, state, or local law as a felony or that is otherwise a serious crime -- but not including the purchase of stolen or contraband goods or the making of false representations to third parties in concealment of personal identity or the true ownership of a proprietary -- must be approved in advance by an Assistant Director on the recommendation of the Undercover Operations Review Committee pursuant to paragraphs D-G, except that the Director's approval is required for participation in any otherwise illegal activity involving a significant risk of violence or physical injury to individuals. Approvals shall be recorded in writing.

A recommendation to FBIHQ for approval of participation in such otherwise illegal activity must include the views of the United States Attorney, Strike Force Chief, or Assistant Attorney General on why the participation is warranted.

(3) Participation in the purchase of stolen or contraband goods, or in a nonserious misdemeanor, must be approved in advance by the Special Agent in Charge. Approvals by the SAC shall be recorded in writing.

(4) The FBI shall take reasonable steps to minimize the participation of an undercover employee or cooperating private individual in any otherwise illegal activity.

(5) An undercover employee or cooperating private individual shall not participate in any act of violence, initiate or instigate any plan to commit criminal acts, or use unlawful investigative techniques to obtain information or evidence for the FBI (e.g., illegal wiretapping, illegal mail openings, breaking and entering, or trespass amounting to an illegal search).

(6) If it becomes necessary to participate in otherwise illegal activity that was not foreseen or anticipated, an undercover employee should make every effort to consult with the SAC. For otherwise illegal activity that is a felony or a serious misdemeanor, the SAC can provide emergency authorization

under paragraph N. If consultation with the SAC is impossible and there is an immediate and grave threat to life or physical safety (including destruction of property through arson or bombing), an undercover employee may participate in the otherwise illegal activity so long as he does not take part in and makes every effort to prevent any act of violence. A report to the SAC shall be made as soon as possible after the participation, and the SAC shall submit a full report to FBIHQ. FBIHQ shall promptly inform the members of the Undercover Operations Review Committee.

(7) Nothing in these guidelines prohibits establishing, funding, and maintaining secure cover for an undercover operation by making false representations to third parties in concealment of personal identity or the true ownership of a proprietary (e.g., false statements in obtaining driver's licenses, vehicle registrations, occupancy permits, and business licenses) when such action is approved in advance by the appropriate SAC.

(8) Nothing in paragraph I(5) or (6) prohibits an undercover employee from taking reasonable measures of self defense in an emergency to protect his own life or the life of others against wrongful force. Such measures shall be reported to the SAC and the United States Attorney, Strike Force Chief, or Assistant Attorney General as soon as possible.

(9) If a serious incident of violence should occur in the course of a criminal activity and an undercover employee or cooperating private individual has participated in any fashion in the criminal activity, the SAC shall immediately inform FBIHQ. Headquarters shall promptly inform the Assistant Attorney General in charge of the Criminal Division.

#### J. Authorization of the Creation of Opportunities for Illegal Activity

(1) Entrapment should be scrupulously avoided. Entrapment is the inducement or encouragement of an individual to engage in illegal activity in which he would otherwise not be disposed to engage.

(2) In addition to complying with any legal requirements, before approving an undercover operation involving an invitation to engage in illegal activity, the approving authority should be satisfied that

- (a) The corrupt nature of the activity is reasonably clear to potential subjects;
- (b) There is a reasonable indication that the undercover operation will reveal illegal activities; and

- (c) The nature of any inducement is not unjustifiable in view of the character of the illegal transaction in which the individual is invited to engage.

(3) Under the law of entrapment, inducements may be offered to an individual even though there is no reasonable indication that that particular individual has engaged, or is engaging, in the illegal activity that is properly under investigation. Nonetheless, no such undercover operation shall be approved without the specific written authorization of the Director, unless the Undercover Operations Review Committee determines (See paragraph F), insofar as practicable, that either

- (a) there is a reasonable indication, based on information developed through informants or other means, that the subject is engaging, has engaged, or is likely to engage in illegal activity of a similar type; or
- (b) The opportunity for illegal activity has been structured so that there is reason for believing that persons drawn to the opportunity, or brought to it, are predisposed to engage in the contemplated illegal activity.

(4) In any undercover operation, the decision to offer an inducement to an individual, or to otherwise invite an individual to engage in illegal activity, shall be based solely on law enforcement considerations.

X. Authorization of Investigative Interviews that are Not Part of an Undercover Operation

Notwithstanding any other provision of these guidelines, routine investigative interviews that are not part of an undercover operation may be conducted without the authorization of FEIMQ, and without compliance with paragraphs C, D, and E. These include so-called "pretext" interviews, in which an FBI employee uses an alias or cover identity to conceal his relationship with the FBI.

However, this authority does not apply to an investigative interview that involves a sensitive circumstance listed in paragraph B. Any investigative interview involving a sensitive circumstance -- even an interview that is not conducted as part of an undercover operation -- may only be approved pursuant to the procedures set forth in paragraphs D, E, F, and G, or pursuant to the emergency authority prescribed in paragraph N, if applicable.



MONITORING AND CONTROL OF UNDERCOVER OPERATIONSL. Continuing Consultation with United States Attorney or Strike Force Chief

Throughout the course of any undercover operation that has been approved by Headquarters, the SAC shall consult periodically with the United States Attorney, Strike Force Chief, or Assistant Attorney General concerning the plans and tactics and anticipated problems of the operation.

M. Serious Legal, Ethical, Prosecutive, or Departmental Policy Questions, and Previously Unforeseen Sensitive Circumstances

(1) In any undercover operation, the SAC shall consult with Headquarters whenever a serious legal, ethical, prosecutive, or Departmental policy question is presented by the operation. FBIHQ shall promptly inform the Department of Justice members of the Undercover Operations Review Committee of any such question and its proposed resolution.

(2) This procedure shall always be followed if an undercover operation is likely to involve one of the circumstances listed in paragraphs A and D and either (a) The SAC's application to FBIHQ did not contemplate the occurrence of that circumstance, or (b) the undercover operation was approved by the SAC under his own authority. In such cases the SAC shall also submit a written application for continued authorization of the operation or an amendment of the existing application to Headquarters pursuant to paragraph E.

Whenever such a new authorization or amended authorization is required, the FBI shall consult with the United States Attorney, Strike Force Chief, or Assistant Attorney General, and with the Department of Justice members of the Undercover Operations Review Committee on whether to modify, suspend, or terminate the undercover operation pending full processing of the application or amendment.

N. Emergency Authorization

Notwithstanding any other provision of these guidelines, any SAC who reasonably determines that:

- (a) an emergency situation exists requiring the establishment, extension, renewal, or modification of an undercover operation before an authorization mandated by these guidelines can with due diligence be obtained in order to protect life or substantial property, to apprehend or identify a fleeing offender, to prevent the hiding or destruction of essential evidence, or to avoid other grave harm, and
- (b) there are grounds upon which authorization could be obtained under these guidelines.

may approve the establishment, extension, renewal, or modification of an undercover operation if a written application for approval is submitted to Headquarters within 48 hours after the undercover operation has been established, extended, renewed, or modified. In such an emergency situation the SAC shall attempt to consult by telephone with the United States Attorney, Strike Force Chief, or Assistant Attorney General, and with a designated Assistant Director. FBIHQ shall promptly inform the Department of Justice members of the Undercover Operations Review Committee of the emergency authorization. In the event the subsequent written application for approval is denied, a full report of all activity undertaken during the course of the operation shall be submitted to the Director, who shall inform the Deputy Attorney General.

O. Annual Report of Undercover Operations Review Committee

(1) The Undercover Operations Review Committee shall retain a file of all applications for approval of undercover operations submitted to it, together with a written record of the Committee's action on the applications and any ultimate disposition by the Director or a designated Assistant Director. The FBI shall also prepare a short summary of each undercover operation approved by the Committee. These records and summaries shall be available for inspection by a designee of the Deputy Attorney General or of the Assistant Attorney General in charge of the Criminal Division.

(2) On an annual basis, the Committee shall submit to the Director, the Attorney General, the Deputy Attorney General, and the Assistant Attorney General in charge of the Criminal Division, a written report summarizing: (a) the types of undercover operations approved; and (b) the major issues addressed by the Committee in reviewing applications and how they were resolved.

P. Preparation of Undercover Employees

(1) The SAC or a designated supervisory agent shall review with each undercover employee prior to the employee's participation in an investigation, the conduct that the undercover employee is expected to undertake and other conduct whose necessity during the investigation is foreseeable. The SAC or designated supervisory agent shall expressly discuss with each undercover employee any of the circumstances specified in paragraphs A and B which is reasonably expected to occur.

Each undercover employee shall be instructed generally, and in relation to the proposed undercover operation, that he shall not participate in any act of violence; initiate

or instigate any plan to commit criminal acts; use unlawful investigative techniques to obtain information or evidence; or engage in any conduct that would violate restrictions on investigative techniques or FBI conduct contained in Attorney General Guidelines or other Department policy; and that, except in an emergency situation, he shall not participate in any illegal activity for which authorization has not been obtained under these guidelines. When the FBI learns that persons under investigation intend to commit a violent crime, any undercover employee used in connection with the investigation shall be instructed to try to discourage the violence.

(2) To the extent feasible, a similar review shall be conducted by a Special Agent with each cooperating private individual.

Q. Review of Undercover Employee Conduct

(1) From time to time during the course of the investigation, as is practicable, the SAC or designated supervisory agent shall review the actual conduct of the undercover employee, as well as the employee's proposed or reasonably foreseeable conduct for the remainder of the investigation, and shall make a determination whether the conduct of the employee has been permissible. This determination shall be communicated to the undercover employee as soon as practicable. Any findings of impermissible conduct shall be promptly reported to the Director, and consultation with the Director shall be undertaken before the employee continues his participation in the investigation. To the extent feasible, a similar review shall be made of the conduct of each cooperating private individual.

(2) A written report on the use of false representations to third parties in concealment of personal identity or the true ownership of a proprietary, for establishing, funding, and maintaining secure cover for an undercover operation, shall be submitted to the SAC or designated supervisory agent at the conclusion of the undercover operation. A written report on participation in any other activity proscribed by federal, state or local law shall be made by an undercover employee to the SAC or designated supervisory agent every 60 days and at the conclusion of the participation in the illegal activity.

R. Deposit of Proceeds; Liquidation of Proprietaries

As soon as the proceeds from an undercover operation are no longer necessary for the conduct of the operation,

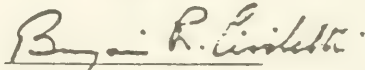


the remaining proceeds shall be deposited in the Treasury of the United States as miscellaneous receipts.

Whenever a proprietary with a net value over \$50,000 is to be liquidated, sold, or otherwise disposed of, the FBI, as much in advance as the Director or his designee shall determine is practicable, shall report the circumstances to the Attorney General and the Comptroller General. The proceeds of the liquidation, sale, or other disposition, after obligations are met, shall be deposited in the Treasury of the United States as receipts.

#### RESERVATION

These guidelines on the use of undercover operations are set forth solely for the purpose of internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to, create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal, nor do they place any limitations on otherwise lawful investigative or litigative prerogatives of the Department of Justice.



Benjamin R. Civiletti  
Attorney General

Date. 12/31/80

Senator PRESSLER. Let me turn to the issue of Federal sentencing guidelines. The judges in South Dakota, the Federal judges, Democrat and Republican, tell me that it pains them when a young Indian person comes before them who has been found to have so many ounces of marijuana in his pocket; the Federal judges in South Dakota frequently take original jurisdiction on the tribal lands, as I understand it. They have been required to sentence such a person for a very lengthy period of time. They feel that when he comes out of the penitentiary after 10 years, he will come out a hardened criminal. They feel they have no options.

What should Congress do about mandatory sentences or sentencing guidelines, I guess they are called, aren't they?

Mr. HEYMANN. Well, there are actually three things, Senator Pressler. There are a certain number of mandatory sentences, an increasing number that have been passed by the Congress with the approval of the executive branch, and then there are the sentencing guidelines created by the Sentencing Commission which the Congress has created, and then in the old days there was a great deal of discretion in judges themselves.

My first recommendation, which I have made earlier, is that where there is a choice between mandatory sentences set in legislation or leaving the setting of sentences to the guideline commission which has to make decisions and then lay it on the table for Congress to accept or reject, to use the Sentencing Commission as much as possible. They are charged with considering the capacity of prisons, the equality of sentence for similar crimes.

Then the next question becomes what if the judge feels the Sentencing Commission recommendation is too harsh, which many, many judges do. For the time being, I think the answer to that is let them express their complaints to the Sentencing Commission, and I think we ought to let the process work its way out.

Senator PRESSLER. Good; thank you very much.

The CHAIRMAN. Thank you.

Senator Kohl.

#### OPENING STATEMENT OF SENATOR KOHL

Senator KOHL. Thank you very much, Senator Biden.

Mr. Heymann, I am glad to see you here today. I enjoyed talking with you in the office the other day. In the flow chart, as Deputy Attorney General, you report to Attorney General Reno, or you would.

Mr. HEYMANN. Yes, sir.

Senator KOHL. Anybody else report to her on the flow chart except yourself?

Mr. HEYMANN. The Associate Attorney General would report to her on matters coming from the civil side, Senator Kohl, unless she was absent, in which case the Associate Attorney General would report to me. In other words, if there were a case coming out of the Tax Division and the Associate Attorney General wanted to take it up with somebody, he would take it up with the Attorney General, not with me in the first instance.

Senator KOHL. Is he or she the only other person that would report to Attorney General Reno on a regular basis besides yourself?

Mr. HEYMANN. I believe the Solicitor General will, too, Senator Kohl.

Senator KOHL. I just want to point that out and indicate how enormously important your job is. In fact, you are the second ranking person in the Attorney General's office in the Justice Department.

Mr. HEYMANN. Yes, Senator.

Senator KOHL. Mr. Heymann, when we talked about kids and guns in my office, we were both, of course, very cognizant about how serious the problem is. All across our country, kids can get guns without any particular difficulty, virtually anywhere, as long as they have any interest in acquiring a gun. I mean 6-, 8-, 10-, 12-, 14-year-old kids. They can buy guns in the streets in every major city in our country, and probably in suburban and rural areas, also.

There is no question about how bad this is, how serious it is, and no question about the fact that we cannot really take back our streets and do anything about promoting safety in this country until we do something to it, take away the ability of kids to get guns. I presume you agree with this. If you do not, I would like to hear you say why not. But if you do, I would like to hear something from you on how we are going to do something about this problem in the next couple of years.

Mr. HEYMANN. Senator, I certainly think that kids with guns, including and indeed particularly around the school and in the school, are a terrible problem in the country. I think there are many places where people cannot safely send their children to school, and that is the American dream and that is the basis of equal opportunity.

I think there are places where, if you step on the toe of the wrong person and you are a kid, you are likely to be shot. Maybe if you are an adult, you are likely to be shot, too. I have no hesitancy about metal detectors in the schools. It is a shame, but that is reality. I think we cannot allow guns in the schools.

I would like to see community policing play a role here. I imagine that when a kid has guns, he frequently lets other people know he has guns, and when that is known, perhaps we could go after it through community policing.

Senator KOHL. Are you saying you recommend that we put metal detectors in schools all across this country?

Mr. HEYMANN. Not in every school. There are lots of schools—my grandson Paul goes to a high school that is associated with it in Winchester, MA, that does not need metal detectors. I would say when there is a serious problem of guns, the most important thing isn't—

Senator KOHL. Community policing and metal detectors in schools are certainly things that will help. But if somebody assigned you the responsibility to take guns out of the hands of kids in this country, and you had no other responsibility, I have got to believe you would do more than that—I know you would do more than that. Let's talk about that.

What would you do, if you could do three or four or five things to take guns out of the hands of kids? What would you do about the ability of dealers all across this country to get guns from manu-



facturers who produce them just for dealers? And I am sure you are aware of this, of \$25 guns that wind up in our central cities. What would you do about those dealers and about those manufacturers?

Mr. HEYMANN. I believe in the Brady bill. I think the Brady bill will help. I don't know what——

Senator KOHL. First of all, a dealer, as I understand it, can be licensed for \$50.

Mr. HEYMANN. \$30 or something like that.

Senator KOHL. \$30. Once you got that \$30 license, you can order any number of guns from these manufacturers, who make these guns with the streets in mind—\$25 guns. And so you order yourself 50 or 100 guns for \$25 and then go out in the street and sell them to kids for \$50 or \$75. It is as easy as that. Can't we do something about that, Mr. Heymann, if you become Deputy Attorney General? Can't you tell us and the American people what you would do about that?

Mr. HEYMANN. I know what I plan to do, Senator Kohl, but I am worried that it is not a satisfying answer. I actually plan to very quickly assemble a very talented group of people about that, two talented groups of people. I mentioned this morning that I have already begun to assemble for the Attorney General a group of experts on gang violence and kid violence. I am talking about Deborah Prothrow-Stith, who has written on gangs. I am talking about Tony Earles, who is doing a huge Chicago study, and I think there are other experts. The former Secretary of HHS, Mr. Sullivan. And I want to know what they have to say.

Second of all, I think we have to put together under me a group of people whose full-time job it is to design the very type of program that you are describing. Now, I have people in mind. I am putting their names on paper, but I should not say who it is, and I think that is the right way to go, and I would be happy to——

Senator KOHL. Do you think that one of the things we ought to be doing is raising considerably the amount of money it costs to get a Federal gun dealer's license?

Mr. HEYMANN. I think \$30 is an unreasonably low amount for a gun dealer's license.

Senator KOHL. Would you be interested in taking a look at companies which manufacture guns that tend to wind up in the street in the hands of people who don't use them for any good reason at all?

Mr. HEYMANN. I would like to look at anything and everything, including that, Senator Kohl, that really bears on violence, particularly violence by young people on the streets of our rural areas and our cities.

Senator KOHL. Do you consider it to be a priority issue?

Mr. HEYMANN. I think it is the number one scandal in the crime area in the United States. The figures on the risk to young Americans, particularly young minority Americans, are absolutely staggering. Nobody should have to bring up children with that kind of risk to their safety and expect to bring them up in a way that they can improve themselves, go to college, take good jobs. It cannot be done until we solve this problem.

Senator KOHL. I think you are right. You talked about the risk to young Americans and particularly to young minority Americans. In your opinion, would we have done something long before now, if the risk were as great for the rest of the population as it is to minorities? What is your opinion? Would we have tolerated it?

Mr. HEYMANN. Senator, I think that without purposely doing it, we have located the grave danger of a very high measure of violence in specific localities, and I think I am as safe as can be in Belmont, MA, and I am at no risk and I think that 10 miles away in downtown Boston the risk is extreme.

Senator KOHL. Mr. Heymann, as you know, I am chairman of the Juvenile Justice Subcommittee. We talked about that, also, and I enjoyed our conversation. The funding for juvenile justice all across this country, not just for a State or two, is only \$75 million a year at the Federal level, and there is no question that we could do many good things with more funding. The funding has actually been cut, but has remained at \$75 million for a few years—\$75 million for 50 States.

I have asked you whether or not you would fight for or support additional funding. We have devoted precious little time and attention to the problems of juvenile crime and kids and guns in this country. Would you fight with me to take money away from other programs, if necessary, to get additional funding for juvenile justice?

Mr. HEYMANN. I shouldn't and don't want to make any promises with regarding to shifting funds under anything, Senator Kohl. I haven't looked at the budget. This is the wrong time and the wrong place to be talking about budget matters, but I will look at it very seriously. You and I share a common belief that crime toward and by young people is a terrible problem in the United States, and it is certainly Attorney General Reno's number one priority.

Senator KOHL. Good; I am delighted. I know you talked this morning with Senator Simon about TV violence, and I would like to just skim that and listen to your response to a question or two from myself.

How far would you be willing to go to convince those people who control programming that we are doing the wrong thing when we allow kids to watch the kind of stuff that they are seeing on TV, that it is corrupting their minds and their morals and their values at a time in life when they are susceptible to this kind of corruption. It is bad for the country. It may be good for the profit and loss statements, but it is bad for the country. Do you agree that they have a responsibility that is not being discharged, and that we need to do something about it? If you agree, how far would you be willing to go to achieve some progress on this front?

Mr. HEYMANN. Senator Simon asked me a much easier question, Senator Kohl. He said would we take a very hard look at whether we could give an honest legal opinion that the networks could get together and agree to reduce violence, get together to that extent, despite the antitrust laws. I have no problem with that whatsoever.

On anything that looks like censorship—and you and I both know that we are dealing with very difficult issues—I would want to look long and hard at what we would do in terms of telling the

networks what they could or couldn't do in the way of programming.

Senator KOHL. I am sure you would, and so would I, but it sort of begs the question. If we see programming that has the ability to corrupt children's minds, doesn't society and government have some interest in what is happening there?

Mr. HEYMANN. The Government has an interest, but the Government also has—I am sounding as if I am coming down firmly on the issue, just in terms of being sure that both sides are on the table—the Government also has a very strong interest in not being the one to regulate the content of television, books, newspapers, anything like that, and that involves tolerating a great many bad things that can take place through those media.

Senator KOHL. All right. With regard to Weed and Seed, Mr. Heymann, as you know, Madison, WI, is a Weed and Seed site, 1 of 14 or 16 experimental sites. The mayor of Madison, Paul Soglin, has told me on many, many occasions that Weed and Seed is one of the best programs he has. It has been an experimental program now for several years. What are your hopes for expanding Weed and Seed, in light of the success it has had in rooting out crime and in promoting peaceful kinds of activities in our central cities?

Mr. HEYMANN. I think we want to expand it. In some places, Senator Kohl, Weed and Seed has been wonderful, and in some places it has been, to be honest, a farce, it hasn't really taken place at all.

We want to do something very much like Weed and Seed. We like the notions of it. We want to do something very much like it. We want to make it never a farce. We want to make it work. I will be interested to take a look at Madison, because it is working there and other places it has worked. It is a concept that is very congenial to the Reno Department of Justice and the Clinton administration.

Senator KOHL. Thank you very much, Mr. Heymann. I have met several dozen candidates for Cabinet and other positions since I have been here, and I have not met anybody whom I was impressed with, whom I enjoyed talking with, and whom I am looking forward to serving with more than you.

Mr. HEYMANN. Thank you very much, Senator. You have made about a week.

Senator KOHL. I am delighted.

The CHAIRMAN. In that case, he can call you Heymann, right? [Laughter.]

Mr. HEYMANN. With a comment like that, he can call me Smith, if he wants to. [Laughter.]

I think early on you said Mr. Heymann and later you said Mr. Heymann, and if that makes me a diplomat, so be it. [Laughter.]

The CHAIRMAN. Senator Grassley, the floor is yours.

Senator GRASSLEY. Thank you, Mr. Chairman.

A couple of senior status judges have protested sentencing guidelines by refusing to hear some drug cases. Their position is that the States, rather than the Justice Department, should bring cases for nonviolent drug offenses. I would like to know what your view is about that, if you have a position, and what your position is.



Mr. HEYMANN. Senator, I think Federal judges, if they are not on senior status, have to enforce the laws that the Congress passes and they have to hear the cases that are brought by the Department of Justice. I don't think they have a right to choose. These two judges, who are very distinguished and famous judges, are on senior status, as you mentioned. That means that, as I understand it, in effect, they take such cases as they want to. I think whatever they have done is within their power, as senior status judges.

Senator GRASSLEY. Regardless of the fact that they are senior judges, just on the proposition generally, do you believe that there should be any change of policy regarding whether cases are brought under Federal law or under State prosecution?

Mr. HEYMANN. Senator Grassley, the Attorney General is very interested in trying to sort out a little better than we have what is Federal and what is State. I don't think that has anything to do with the two senior judges in New York. I don't even know if it bears on it in any way. But she is anxious to try and draw something closer to lines telling where Federal investigation and prosecution should take place and where we should rely on the localities, so I anticipate we will be addressing that question.

Senator GRASSLEY. At this point, you would rather not express how you see it?

Mr. HEYMANN. I can tell you in just a couple sentences what I regard in a general way as the division. I think there are a number of things that the States simply—and by the States here, we mean the localities more than States—simply cannot handle, and those things involve multijurisdiction matters, international matters, huge drug cartels, very large organized crime, fraud that cuts across a number of States, savings and loan issues that are the same in many places, civil rights violations, environmental violations, terrorism.

I think we have to make sure, number one, that the Federal Government carries out those responsibilities which the localities cannot carry out. It is just a convenient way to make sure that somebody is doing everything that has to be done, but then I think the problem of violence and drugs destroying our cities and towns and rural communities is so severe, that the Federal Government has to be weighing in as a helper, as a partner in those problems, too.

Senator GRASSLEY. Some State laws compared to Federal discipline of drug offenders might, relatively speaking, have a slap on the wrist sort of response, if convicted, as opposed to the Federal Government. So if in some instances, if the Federal Government doesn't prosecute drug peddlers that you might consider very big and very bad, they may not really be taken off the street long enough to make the prosecution worthwhile, if it isn't done under Federal law as opposed to State law. Would that be an instance in which you would push for Federal prosecution, as opposed to under State law?

Mr. HEYMANN. I would push for Federal prosecution in that case, Senator Grassley, but I would also try to let the State know that it bears some responsibility here, too, and it should make its punishment severe enough in its investigative resources focused enough to get the very bad local people. To the extent they couldn't, the Federal Government should be doing it.

Senator GRASSLEY. Do you have any plans for strengthening the Department's Office of Victims of Crime, or do you think maybe that Office and our approach in that area is strong enough?

Mr. HEYMANN. I haven't looked at it, Senator Grassley. I think the victims movement is a very healthy and good movement, and so I favor that approach very much, but I haven't looked at the office at all.

Senator GRASSLEY. Would you have a philosophy that might give me some information of how you think a victim's point of view ought to be or not be heard, and at what time in the process of determining guilt or innocence?

Mr. HEYMANN. Let me start with the philosophy. I think one of the most important things that criminal law does, in general, is hold society together by giving a social form of retribution, a social form of punishment when somebody is victimized. Otherwise, they have the promise of either being victimized over and over again and taking it, or taking matters into their own hands. And see people taking matters into their own hands in many countries in the world, particularly in Latin America.

So I think that getting the victim into the process and letting the victim feel that the victim owns part of the process—owns is too strong, but let me just use it, although it is too strong—owns the process is a very healthy development in any society. On the stages, I think it ought to start early on with the decision as to whether to prosecute, although not in domestic violence cases. I think we ought to prosecute domestic violence cases, even if the victim doesn't want it in most instances, but, in general, I think it ought to start very early on and it ought to be considered before plea bargaining. The victim's attitude doesn't have to control, but if at all possible should be considered in plea bargaining.

Senator GRASSLEY. At what point would you personally feel that involving the victim in the process, particularly in the courtroom, might interfere with the defendant's constitutional rights?

Mr. HEYMANN. I am not exactly sure how it would come up, Senator Grassley, but if the victim is a single witness and not more than a single witness, I would want to be sure that a trial didn't suggest that the jury didn't have the idea that the victim had a bigger role than that.

Senator GRASSLEY. What about a victim's impact statement?

Mr. HEYMANN. At the sentencing stage for the judge?

Senator GRASSLEY. Yes.

Mr. HEYMANN. I don't have any clear ideas on it, but I can understand wanting that out there, too.

Senator GRASSLEY. On another point, in 1987, you wrote an op-ed piece on the independent counsel. You wrote, and I agree with you, that, "We have gone far (perhaps too far) towards demanding social acceptance of whatever behavior is not forbidden criminally." I would like to have you elaborate to some extent on what sort of behavior you had in mind when you wrote that article.

Mr. HEYMANN. I am afraid I am going to have to ask you to read—

Senator GRASSLEY. It is only one sentence that I am asking about.

Mr. HEYMANN. If you read it once more, I would probably get it.

Senator GRASSLEY. "We have gone far (perhaps too far) towards demanding social acceptance of whatever behavior is not forbidden criminally."

Mr. HEYMANN. I understand it now. What was I saying?

Senator GRASSLEY. More so than what you were saying is what kinds of behavior did you have in mind when you wrote the article.

Mr. HEYMANN. A variety of inflammatory hateful behavior toward other groups, Senator Kohl's question about excessive violence, things on television or elsewhere, things that I wouldn't prohibit, you know, a lot of hateful speech, including hateful speech, I wouldn't—

Senator GRASSLEY. Back up. Unless I am wrong, this is in regard to the public issue of the independent counsel.

Mr. HEYMANN. I am afraid that relationship is escaping me at the moment. I just don't remember how I put it.

Senator GRASSLEY. Let me use another term, the term I should have used, a special prosecutor. I think that is what the article related to. If you don't remember, then I will just ask you to respond in writing.

Mr. HEYMANN. I think it would probably be a better idea, Senator Grassley, because I am just not remembering at the moment. [The information referred to follows:]

#### MR. HEYMANN'S RESPONSE TO SENATOR GRASSLEY'S QUESTION

Title: Independent counsel has a lonely role.

Author: Philip Heymann.

Date printed: January 13, 1987.

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Senator GRASSLEY. On the subject of terrorism, our Judiciary Committee recently, by the way, held a hearing on the issue of terrorism, and I understand that you are in the process of writing about concerns about criminal justice responses to the problem of international terrorism. In fact, I guess you have got a book coming out on that.

Mr. HEYMANN. With two other authors, yes, sir.

Senator GRASSLEY. What recommendations are contained in your book regarding the role of criminal justice in punishing international terrorist acts?

Mr. HEYMANN. Senator, I like the extraterritorial statutes that the Congress has been passing. I think we had not better not do too many of them, but the statutes that make it a crime anywhere in the world for a terrorist group to attack American citizens or to kill American citizens, I think they have proved to be effective not because we have been able to get extradition, because we have not been able to get extradition, but because we have been able to persuade Greece, Italy, Germany, and France to carry out trials that they wouldn't otherwise carry out.

To put it another way, I think that no nation has a self-interest in protecting some other nation's citizens by trying terrorists. All you do is make it dangerous for yourself in order to protect American citizens, if you are France or Italy or Greece or Germany, so you don't want to try terrorists who are only attacking Americans.

I think with the extraterritorial statutes that Congress has passed, we have been able to send the FBI over there, ask to inves-



tigate the facts ourselves, carry out an investigation, present the evidence to the foreign country and say either send the person back to us or you try them, and that has been very successful.

Senator GRASSLEY. A question that deals with the role of the Justice Department over the last 12 years—I mention that number only because that is how long we have had Republican Presidents. But since you have left the Department, we have seen the Justice Department grow faster than any other department, even including the Defense Department.

The additional functions that it has assumed over that time have changed the mission of the Department much more toward law enforcement. Some people have criticized this trend, because they think that the primary mission of the Department should be civil rights enforcement. What do you think is the primary function of the Justice Department, particularly as it relates to criminal enforcement, but not limited to the increase in the growth of the criminal branch?

Mr. HEYMANN. I don't think it is possible to give a priority to the criminal side of the Justice Department over the civil side. My interest has always been on the criminal side, so if you ask me, I would say it was more important. But I think the civil rights jurisdiction, I think the environmental jurisdiction, I think the tax enforcement and, of course, defending the Government through the Civil Division, I think all of those things are very important, too.

I think in terms of problems, we have a huge problem in the Nation on the criminal side and a huge problem on the civil side. The huge problem on the criminal side is violence, drugs and what they are doing to cities and towns in America. That is on the criminal side. On the civil side, I think the huge problem is that we have got a system that is too cumbersome, too expensive, too slow for people to use to handle their problems, and I think the Justice Department should be trying to address both of those.

Senator GRASSLEY. The reason I ask the question, and it may sound academic, but I think it goes beyond that to our realities of the budget situations we are in and the priorities refer to a recent Forbes article—although I am sure you could read about it in a lot more scholarly publication than that—regarding divisions between State and Federal law enforcement, and also to some competition, let me say, between the Federal Government and the States. Along that line, in the priority areas that you have identified or even might identify, if you didn't want to be considered definitive, to what extent do you think there should be duplication between State agencies and the Federal agency?

Mr. HEYMANN. In an ideal world, Senator, on the criminal side, I would keep the Federal Government in an ideal world, not in our world. I would keep the Federal Government doing the things that the localities can't be expected to handle, and that is things that involve a lot of States, very big complicated cases that require accountants.

However, we don't live in an ideal world, and about 12 years ago, largely Republican administrations decided, and I think they were right, that the problem of violence was so serious that the Federal Government had to give it a helping hand. I don't think we have found the way yet. I hope that this administration will start to

make more headway on violence. Violence figures have gotten worse and worse over the last 12 years. So I think the real division in the long run is between what the localities can do and what they can't do, but for the moment I think both the Federal Government and the localities have to be working on the hardest of all problems, which is destruction of cities and towns by a combination of violence and drugs.

Senator GRASSLEY. Thank you. I yield.

The CHAIRMAN. Mr. Heymann, the reason I am not asking you that many questions is that I have had the occasion to ask you a lot of questions over the years. I have come to rely on your advice as I've worked with you in the past and worked with you in your capacity as a professor.

So what I am about to do in my second round here, and I will only take a few minutes of it, is again raise a broad issue with you, and I would like to do it with Senator Grassley here, because I want to pay him the compliment of pointing out that, on the issue of victims' rights, he has been in the forefront of that debate and issue for as long as he and I have served on the Judiciary Committee, which is getting to be a long time now.

Initially, when I first came to the Congress in 1972, the debate about the way to deal with victims' rights was cast in terms of limiting those rights guaranteed by the Constitution to the criminally accused.

Fortunately, I think we have moved beyond that debate and more into the area of what is the legitimate role that a victim should play in the process. In my view, one of the roles should be to reconnect society to the system. I think if you look at all the polling data, what the polls suggest is the thing that concerns the American people more than anything else is their physical safety, the safety of their children, their parents, in their home, in the school, on the street, in the workplace.

Yet, when asked whether or not they think that is the most important thing that the Government should attend to, it ends up pretty far down the list. After speaking to some of the pollsters and analysts, I take that to mean that they have kind of given up hope on or faith in the Government's ability to do much about the problem—not that it's no longer the most important problem to them.

I believe that is part of the reason why victims have been opted out of the process. It seems to me that part of dealing with any tragedy, and being a victim is a tragedy, is that you have to work your way through the process. It is a normal process that human beings go through to reconstruct their lives, whether they have been violated in the sense that someone burglarizes their home when they are not there, or whether they have been physically beaten or abused and felt the actual physical effects of the violence.

In preparation for a speech I was making to a victims group, Cynthia Hogan, the chief counsel on the staff, reminded me of something I had known and forgotten, and you, as a criminal law professor will know it better than I even now in recounting it. Early on, prior to becoming a nation, when we were still colonies, the way in which a victim of a crime would respond was to go hire the sheriff. They would actually go out and hire the sheriff to track down the person who perpetrated the crime against them. They

would then either personally arrest the person and take them to the sheriff, or the sheriff would make the arrest and take them to a magistrate. They would then hire a lawyer. They would hire representation. They would hire a prosecutor to prosecute John Doe who just mugged them or broke into their home.

If, in fact, there was a conviction after a jury trial, then the victim could pay the cost of incarcerating the individual or they could and would receive restitution. The court would order that John Doe, who did the following things to Joe Biden, would have to reconstruct his home, pay him a fine, et cetera.

We got away from that system, because it benefited only landed wealth, and it benefited only those people who could afford to go through all that cumbersome process.

But in the process of doing that, I am of the view that we lost something very, very important and tangible. Instead of Biden v. Smith, it became the State v. Smith, and Biden the victim or Grassley the victim or Heymann the victim essentially became a bit player in the whole process, never receiving the psychic rehabilitation, let alone the financial remuneration.

Now, as you know better than I do, especially in large jurisdictions, prosecutors have hundreds of cases, police officers have thousands of cases, and they don't have a whole lot of time to contact me the victim before they decide to plea bargain. They walk into court with 30, 40, 50 folders on the first Monday of the month. It depends on what the jurisdiction is, but they walk into court, and they are plea bargaining at the last moment, and they don't have time. In most places, they do not have the opportunity to pick up the phone and call Mr. Grassley, the victim of the mugging, and say I'm thinking of doing the following.

Half the time, victims learn about what happens in the newspaper. As a consequence of that, in my view, we have this erosion of confidence in the criminal justice system by the people—even though police are becoming more effective in finding, isolating, and arresting criminals, and conviction rates are inordinately high in most jurisdictions.

So I would like to ask you to consider, when you are reflecting on the reasons for violence, how we empower victims, so they have a stake in the outcome that is recognized by the State.

I truly believe it is one of the central dilemmas we must address, if we are going to get people back into having confidence in the system. Because community policing works, as you point out, if the community is involved. The community does not get involved, if the community concludes they do not have a stake in the outcome.

I would respectfully suggest that you at least entertain the notion, and determine whether or not there is something we can do. I think there are many things we can do—I will not suggest what I think they are at this moment—to deal with the victimization of the victims by the system.

Would you care to respond at all?

Mr. HEYMANN. Senator, I agree with almost everything you have said, and I think I would just like to take seriously the suggestion.

The CHAIRMAN. I look forward to working with you. Again, I want to pay a compliment to my friend from Iowa who has had this as a focus. I am not suggesting he agrees with all that I said, but



the notion of dealing with the rights of victims has been something that he has focused on with a great deal of fervor for a long time.

Senator GRASSLEY. I do agree with what you said.

The CHAIRMAN. I am glad to hear that, and it just goes to show you that we both have great minds, right? I thank the Senator.

The Senator from Pennsylvania.

Mr. SPECTER. Thank you, Mr. Chairman.

Mr. Heymann, I wanted to ask you a few fundamental questions on criminal law enforcement. I have said earlier that I think your job is of enormous importance. I do not think that there is an agency in government more important than the Department of Justice, and, standing right behind the Attorney General, you may well have the day-to-day responsibility to run the office, although Attorney General Reno may do that herself. But you have a job of tremendous importance.

On the first round, I was asking you about some of the questions that arose from other Senators' comments. I enjoyed the opportunity to meet with you informally, and I urge you to take a hard look at the joint task force concept on as broad a basis as possible for the Department of Justice to emulate what has been done in the Eastern District of Pennsylvania. There, we put a special appropriation up in 1986 for Federal-local cooperation, and it is built around the armed career-criminal bill in 1984, which gives enormous leverage to the district attorney, by sending career criminals to the Federal court, which has the individual judge calendar and pretrial detention, where appropriate, and mandatory sentences; it has worked out very, very well there as a model for Triggerlock.

And when you deal with career criminals, you are dealing with the core problem in law enforcement, where the estimates I think are accurate that the career criminals commit up to 700 crimes a year, about 2 a day, and that is the hard-core criminal issue. I would ask what you think about that as a model and how you look forward to utilizing that experience.

Mr. HEYMANN. I have been told by FBI friends that Philadelphia has been a model here, Senator Specter. I have never looked at it beyond that, but I will take a look now.

Senator SPECTER. Are you familiar with the Armed Career Criminal Act of 1984, which authorizes the Federal Government to come into street crime, by giving a mandatory sentence 15 years to life for someone who has been convicted of 3 major felonies and is then caught in the possession of a firearm?

Mr. HEYMANN. I have been vaguely familiar. I haven't looked at the statute, Senator.

Senator SPECTER. Well, that has been passed since you were in the Justice Department, but I urge you to take a look at it.

Second, very briefly, is the issue of drugs. We have a new drug director, Lee Brown, nominated, a man with tremendous law enforcement background. I had the opportunity to meet with him yesterday, and I understand that position is going to be given Cabinet rank. That is going to be another level of differences to work through. We really need streamlining the criminal justice system to put all of these heads under one hat to the extent we can. But I would urge you, as managing director, so to speak, to take a very close look at the drug issue.

When you and I talked, I asked you to take a look at a reallocation of Federal resources, to have a 50-50 split between so-called supply on interdiction and strike forces on the street, contrasted with the so-called demand side on rehabilitation and education. It is my belief, as a district attorney and having been on this committee for 12½ years, that we would get more out of education and rehabilitation, to reallocate the funds on a 50-50 basis. I took that up with the Attorney General and with Commissioner Brown, and I would urge you to take a look at it, as well.

I am reluctant to interrupt you, since you are taking notes, but what do you think about that as a generalization?

Mr. HEYMANN. I know very well and admire greatly Commissioner Brown. As you know, Senator, he was chief of police not only in New York, but also in Atlanta and Houston. That covers a large part of the country and it covers a large part of urban America. I am honestly looking forward immensely to sitting down—I don't care whether Commissioner Brown is the chairman or the Attorney General is the chairperson or who—sitting down and talking about, OK, we are here, it's time, let's talk about drug strategy. As to the 50-50 split, I think it would have to come after that meeting and not before it.

Senator SPECTER. That is an item that I will be following with you. I have a very keen interest in enforcement and I will be following up with you.

Mr. HEYMANN. I will be delighted.

Senator SPECTER. An adjunct of that is the role of the Federal courts, and as the strike force and coordinated force work together, there have been more drug cases going into the Federal courts. It is really necessary in some communities like Philadelphia, where the common plea State courts can't handle it.

Recently, Judge Jack Weinstein, a very distinguished Federal jurist, was quoted as saying that he did not like the Federal courts taking so many drug cases. I called Judge Weinstein, and he said it wasn't the full statement, that he thought that was fine, providing the Federal courts had the big cases and the important ones. And this is one that I am going to be working with him, trying to make some recommendations for standards, but ultimately they are going to be a matter for the Justice Department and the U.S. attorneys. But I think the Federal courts have an enormously important role, and that again is going to be a matter for you, Mr. Heymann, as the number two man.

Mr. HEYMANN. We want to handle the big and the important cases and we don't want them going anywhere else, and I want us to have the resources in courts and prisons and everything else to handle those.

Senator SPECTER. On the prison side, it has already been mentioned that the budget is not adequate and that is something that you are going to have to take a look at, because the adequacy of the Federal prison system is indispensable to doing a job of enforcing the armed career criminal bill.

Senator Biden has long advocated regional jails and I have long advocated the Federal Government putting up prisons for career criminals in the State system, and that is something I would like you to take a look at and it is really going to be for another day.

You have been here a long time and I am not going to keep you much longer. I want to touch briefly on two other subjects. One is habeas corpus, which was mentioned earlier. I am hopeful—and this has been taken up with Attorney General Reno—that we will at an early date get the key people from the House and Senate together with the Justice Department and do a job on habeas corpus. We came very close to having a habeas corpus law a few years ago, that a number of us did a lot of work in drafting. We still have an area that has to be addressed where there is a material dispute of fact on a claim of innocence.

We had an execution this week in Texas on the *Herrera* case, and it is something that we are going to have to direct our attention to, on time limits and avoidance of multiple petitions that are on the same facts. We can talk about that when we sit down together one day.

The next to the last item is independent counsel. In going through the materials, I saw my late colleague Senator Heinz questioned you about this subject back in 1978, and you made a statement which is worth commenting on. You said this in a hearing in 1978 before the Governmental Operations Committee: "The trouble with moving to a special prosecutor in any situation is that you don't get"—I don't mean you personally, I mean one doesn't give

the Executive Branch an opportunity to prove that it can be trusted to investigate at the highest levels of its own party, whatever party is in power, and can be trusted to investigate Congressmen and Senators, no matters what their powers and influence.

I don't want to get into an extended discussion with you now, but I would urge you to take a hard look at independent counsel, the new name for special prosecutor. Attorney General Reno has endorsed it, and it is something I hope we can move to a conclusion.

Mr. HEYMANN. Senator, I have changed my mind since 1978. I think the Independent Counsel Act, as applied to executive officials, is extremely healthy and valuable in the country. I am in favor of it. I took part in discussions with Attorney General Reno before her recent testimony I guess on the Senate side or the House side—

The CHAIRMAN. The House side.

Mr. HEYMANN [continuing]. On the House side. I am very much in favor of that bill.

Senator SPECTER. And the last subject I want to take up with you is a decision which just came down since you started your testimony this morning, and I think you have proved you are as tough as anybody. It is almost 5 o'clock and you are doing fine.

Mr. HEYMANN. Thank you.

Senator SPECTER. The Philadelphia Navy Yard case was subject to another opinion by the Court of Appeals for the Third Circuit, and it is one that many Senators have a keen interest, especially those from the Delaware Valley, Senator Biden and I and others. The third circuit ruled that there is standing in the Federal courts to review what the President, the Congress, and the Base Closing Commission did. The Supreme Court remanded to the third circuit for further consideration of *Secretary of Commerce Franklin v. The Commonwealth of Massachusetts* on the issue of appealability, and the third circuit again ruled in our favor, saying that there would



be judicial review as to what happened on the allegation of failure to comply with the Base Closing Act.

I urge you to take a look at these opinions. We had made some substantial progress toward settlement last spring and fall. It was discontinued because of the pendency of the election, and we have not been able to go back to it, because there hasn't been a Secretary of the Navy, and the Secretary of Defense is moving in all directions. But that is an issue which has really got to be one for the Department of Justice, and I would urge you to take a look at those opinions and I expect a telephone call to see if we cannot reach a compromise on that case to keep the yard open, perhaps a public-private partnership, some naval work, some military work and some civilian work.

In conclusion, the best words of any presentation, I want to compliment Senator Biden. He is the chairman of the powerful Judiciary Committee, and that means he has to sit here all day.

Thank you, Mr. Heymann. Thank you, Mr. Chairman.

Mr. HEYMANN. Thank you, Senator.

The CHAIRMAN. Thank you, Senator.

I just have a question. I assume that our expectation of a phone call on an ongoing case from the Attorney General is an exception to the rule, as we discussed earlier this morning.

Senator SPECTER. Well, the Attorney General is a party to the case. It is the United States of America.

The CHAIRMAN. I happen to agree with you. I just want to make a point that it is kind of complicated, when you set down these rules.

Senator SPECTER. The chairman always gets the last word.

The CHAIRMAN. At any rate, Mr. Heymann, you have demonstrated that your physical constitution is almost equal to your intellectual capability. Although I think your grandson has decided that discretion is the better part of valor, he took up on our invitation to go in the conference room back there. I suggested to him, in returning your call to Senator Metzenbaum, that he probably would have been happier, had his grandpop been nominated for the baseball hall of fame rather than the number two person in the Attorney General's office. He looked at me very seriously, and he said "no," he said there have been some very interesting questions and that some of them have been quite good. [Laughter.]

Seriously, that is what he said. I might point out he was watching the hearing on the television back there. So I expect some day I may be referring to him, if I am still around, as Mr. President. But I want you to thank him for me for suggesting that some members ask some competent questions.

Thank you very much, and I thank your wife for her willingness to be here. We appreciate your willingness to serve and your wife's willingness to support that effort.

Again, thank you very much. I don't imagine, based on what we have heard today, that there is going to be much difficulty with your confirmation. We will convene an executive session as soon as the rules allow that, and I am confident that the majority leader, with the consultation of the minority leader, will schedule your nomination on the floor expeditiously. Although the Department of

Justice is up and going, it will be nice to have all the parties in place. I am sure that will make your job easier, as well as her's.

Again, thank you very much and I look forward to working with you again.

Mr. HEYMANN. Thank you very much, Mr. Chairman.

[The prepared statement of Mr. Heymann follows:]

#### PREPARED STATEMENT OF PHILIP B. HEYMANN

Chairman Biden, Members of the Committee: I have not made a secret of the fact that I was extremely happy to have been nominated to be Deputy Attorney General. The reasons are very simple. I believe deeply that the institutions of justice are essential to democracy.

I know what violence and drugs can do to lives. I helped a young man from Anacostia, here in Washington, to write his life story and we remained friends for decades until he died in his forties as a combined result of bullets and drugs a year or two ago. I have four grandchildren. I can not imagine bringing them up among the dangers and temptations that were part of his every day life and that of his children. I am not just talking about Washington, D.C. It is true of Boston, where I live, and I have talked with people from Topeka, Oklahoma City, and Omaha and they tell the same story of fear, danger, and despair.

If people lack personal security—or doubt the fairness of the system—or live in fear that those who hold government power are unrestrained by law—if any of these things, or all of them are true or believed to be true, a person cannot fully enjoy his or her rights, nor can that person exercise the responsibilities of citizenship. I have seen efforts at democracy without justice where I have worked in Central America, South America, South Africa, and the Soviet Union. It does not work.

The United States is a model of democratic reform for the rest of the world. The U.S. Department of Justice has been and should be a model of effective law enforcement for our many local and state jurisdictions. That is also part of why I want to be here.

The Department of Justice has been in my blood since 1961—through Robert Kennedy, Nicholas Katzenbach, and Archibald Cox, Griffin Bell, Ben Civiletti,—and for the last two weeks—through Janet Reno. While at Harvard, I have taught courses centered on the work of the Department. The added bonus of these classes was the pleasure of maintaining contact with the career lawyers and investigators whom I like and admire so much. The attraction seems genetic. My son, Steve, is deputy chief of the criminal section of the United States Attorney's Office in Boston.

You are entitled to know what I believe we can accomplish under Attorney General Reno's leadership.

First and most important, the Justice Department must earn and maintain the trust and respect of our citizens. With the renewed trust and respect of those we serve, must come a renewed pride and commitment among the almost 100,000 employees who serve the cause of justice. To accomplish this, we must be non-partisan, respectful of process as well as results, and as open to the public as legitimate concerns for privacy and investigative secrecy allow. And above all, we must be receptive to the concerns of individual Americans, particularly those less powerful or more vulnerable. Thirty years ago, in the Department of Justice, I had the opportunity to help defend the Civil Rights Act of 1964. The legacy of Robert Kennedy as Attorney General must stay with us.

Second, we must improve the effectiveness with which we perform the traditional missions of federal law enforcement. Those responsibilities that have long been identified and targeted as appropriate areas of federal intervention must be vigorously pursued. We cannot abandon our commitment nor can we look to other to carry out these responsibilities.

Federal law enforcement must attack major, multi-state or international narcotics traffickers and it must deal with any other organized criminal group so large, so threatening, or so geographically spread that it permeates beyond the effective reach of local jurisdictions. We must pursue the perpetrators of large and complicated frauds, such as those that have infected some of our financial institutions. We must continue to root out public corruption. Protection of federal functions and revenues against theft or obstruction should be among our highest priorities.

No federal responsibility is more important than that of dealing with the problems of terrorism and espionage. These were at the center of Griffin Bell's concerns when we helped draft the Classified Information Procedures Act with this Committee. Federal law enforcement has been remarkably successful in these areas in recent years, often as a result of that Act.

And certainly, federal law enforcement has a special responsibility to punish civil rights violations and environmental crimes.

We must keep and build and use intelligently the federal law enforcement capacities in all these areas. At the same time, we must provide a model of how to use government power with respect for other institutions of democracy such as the press. With this Committee, I helped author the law protecting the media from searches designed to discover news sources or materials. This concern for the impact of law enforcement on other democratic institutions is part of our charter.

Finally, restoring trust in the Department of Justice and discharging effectively and fairly the responsibilities that are federal are not the end of what we envision for this Department. There are national problems—not traditionally federal but still so sweeping in their dimensions, so massive in their effects on the quality of life of our citizens—that the Federal Government cannot and should not step aside, leaving them to be handled only by others. I am deeply troubled by the problem of violence and drugs on our nation's streets. Violence has moved beyond urban areas and is now pervasive in rural areas as well. While local or private organizations often play central roles in dealing with these areas, we must act as partners, associates and helpers because the problems are too large to be approached without our cooperation. That is why the Department of Justice must be there.

I leave to Webb Hubbell the discussion of efforts to build or restore institutions of civil justice where the old ones have broken down. My emphasis will be in the criminal area where violence, fear, and drug dependence threaten individuals, destroy neighborhoods, and empty what should be thriving cities.

I cannot speak as eloquently as the Attorney General but I share her views on how we must proceed.

We must have strong punishment of offenders where their prolonged careers or the viciousness of their acts demand it; and,

We must demonstrate a willingness to explore a wide range of other preventive strategies.

Fighting crime is too important—the harms that crime is doing to our violence-ridden society too costly—to fail to utilize every weapon at our disposal.

Let me close by saying just a word about some ideas we have as to how the Reno Justice Department will go about these three tasks.

A sharpened focus on the harms our laws are intended to prevent; and some skepticism about solutions that are more symbolic than effective in combating those harms.

Great respect for the role and wisdom of local neighborhoods and local leaders; and a desire to see programs and decisions flowing from those at the front lines. We want to work with, learn from, and cooperate with local law enforcement and others in urban and rural communities who have long struggled with the problems of violence and drugs. We do not think we know better. We know that we don't.

A bold willingness to try new things while preserving what's valuable in the old. An impatience with turf battles because we are all—federal and state agencies—pursuing the same ends with resources inevitably too few for the task.

Finally, a frankness about our successes and failures, our hopes and prospects, even though that may subject our actions to criticism.

In fighting crime, we are all in it together. Thank you very much Mr. Chairman. I look forward to answering your questions.

The CHAIRMAN. Thank you.

We are adjourned.

[Whereupon, at 4:55 p.m., the committee was adjourned.]



## NOMINATION OF WEBSTER HUBBELL TO BE ASSOCIATE ATTORNEY GENERAL

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WEDNESDAY, MAY 19, 1993

U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The committee met, pursuant to notice, at 9:43 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Joseph R. Biden, Jr., chairman of the committee, presiding.

Also present: Senators Kennedy, Metzenbaum, Leahy, Simon, Kohl, Moseley-Braun, Hatch, Thurmond, Simpson, Grassley, Specter, Brown, and Cohen.

### OPENING STATEMENT OF CHAIRMAN BIDEN

The CHAIRMAN. Good morning. Today, the Judiciary Committee continues its hearings on the nomination of three top positions for the Department of Justice. Today, in particular, we will begin and end our hearing with Webster Hubbell, the nominee for Associate Attorney General.

As Associate Attorney General, Mr. Hubbell will bear primary responsibility for managing the civil justice side of the Department's operations. A number of critical issues will confront him as the Department of Justice assumes its role in the formulation of administration priorities. Among these priorities are resolving difficult questions about allocation of benefits and burdens in civil litigation, including the formulation and implementation of civil justice policy in connection with the sweeping reforms of the national health care system envisioned by the President.

Also, another priority is renewing our commitment to the vigorous enforcement of our civil rights laws, making the promise of equal justice and equal opportunity real for millions of Americans, and embracing the enforcement of our environmental laws and determining how to balance compliance with our laws and the needs within competitive markets. In addition, the Associate will play a role in shaping Department policy on a host of legal and constitutional issues by supervising the Office of Legal Counsel and the Office of Policy Development.

I will ask Mr. Hubbell about what I believe our national priorities should be, and I look forward to working with the Justice Department to see results in the areas I have mentioned, as well as others.

Let me address one other point because there has been so much discussion about it—Mr. Hubbell's membership in the Country Club of Little Rock. In 1990, this committee took an important step

by passing a resolution, at the urging over the years, I might add, of Senator Metzenbaum and Senator Kennedy and others, but with the leadership of Senator Metzenbaum—this committee took an important step by passing a resolution—all, Democrat and Republican—passing a resolution expressing our view that it was inappropriate for nominees who come before this committee to belong to “clubs where business is conducted that, by policy or practice, intentionally discriminates on the basis of race, color, religion, sex, disability, or national origin.” The one exception recognized by the committee is for those individuals “who are actively engaged in a bona fide effort to eliminate the discriminatory practices of any club, or the perceived discriminatory practices of any club.”

After extensive investigation by the core staff, we are absolutely convinced—and I will submit later for the record—that Mr. Hubbell meets this exception. For some years, he has made bona fide efforts, repeated efforts, to encourage African-American members of the Little Rock community to join the club, and last year the first such member of the club was admitted, specifically with the recommendation of Mr. Hubbell, among others.

Beginning in the mid-1980's, Mr. Hubbell spoke to other members of the club about seeking African-American members for the club. He wrote a letter to the board encouraging recruitment of minority members and he began work with other members to encourage members of the board to actively recruit minority members. Mr. Hubbell also spoke with members of the African-American community to solicit their recommendations for potential members of the club.

The committee has received numerous letters from people who attest to Mr. Hubbell's efforts regarding the club, as well as his efforts on behalf of civil rights more generally. For example, Mahlon Martin—I hope I pronounced that name correctly, the first name—Mahlon Martin, the first African-American city manager in the city of Little Rock, has written the committee stating, “It was primarily Webb Hubbell who convinced me that my candidacy would be a serious one. I have no doubt that he played a significant role in my selection.”

Similarly, Mr. Charles Busey, the first African-American mayor of Little Rock, said that it was at Hubbell's urging that he was nominated to run for mayor. He says flatly, “I would not have been mayor of Little Rock had it not been for Webb Hubbell.”

I personally have no doubt that the nominee has met not only the spirit, but the letter of this committee's resolution that has guided our deliberations the last several years. He has worked from within the club and his efforts have proven successful in one instance. I hope such efforts will be continued at the club and further expand minority membership there.

I am not only satisfied, but pleased with Mr. Hubbell's efforts to integrate the club and to improve his community, and I know others will wish to speak to this, but I want to at the outset—because so many inquiries have come in, Mr. Hubbell, I figured rather than wait until the end, I should speak to it directly. I think that clubs that do not have black members, whether they intentionally discriminate or just don't affirmatively go out and seek black members, or women or any minorities, need people like you within clubs

who are willing, if it required it, to change the attitude of clubs. With people like you not in such clubs, then those clubs are certainly going to remain as we don't want them.

Having said that, let me yield to my ranking member for his opening statement and then I will yield to the distinguished senior Senator from the State of Arkansas and the not much more junior Senator from the State of Arkansas, two of the most popular guys in this body, to introduce their fellow Arkansan.

### OPENING STATEMENT OF SENATOR HATCH

Senator HATCH. Well, thank you, Mr. Chairman. I want to welcome you, Mr. Hubbell, to the Judiciary Committee. We appreciate your willingness to serve your Government and we look forward to working with you.

If confirmed, you will oversee the civil side of the Department, and that is an extremely important responsibility. I won't outline it or go through it, but it is something that requires a great deal of prodigious effort. I have to say, after listening to the chairman last evening, I had the ironic experience of going to a judicial reception where a lot of district and circuit courts of appeals judges were in attendance, Federal judges, and ran into Judge Ryskamp who, of course, was, I think, very harshly treated by this committee on precisely the country club issue.

My personal belief is that you are a very honorable and decent man, that you do not have a discriminatory bone in your body, and that you should, at least from what I have looked at, be confirmed. But I couldn't help but think of the irony of spending last evening with a number of these great judges, including Judge Ryskamp, who was brutalized by this committee on precisely that issue. The Post tried to differentiate, but there really was not much of a differentiation.

After all, I think it is important that people not belong to clubs that discriminate. I think it is important that those who are non-discriminatory types of people work within those clubs to try to make them integrated, and I think our policy in the committee is a decent policy and one that we should support.

If I didn't think that you were the quality of person that I think you are, and that doesn't mean I won't ask some tough questions, but if I didn't think that, I would feel otherwise. But I do feel very deeply about our meetings personally and the work you intend to do, and I want to compliment the President. I believe the President has chosen a very good person to be at Justice and to watch over his interests as well, and I think that is important and I know that you will do a very dedicated and honorable job in doing that; at least I believe you will.

You have two really outstanding Senators who are here, and I know of one outstanding Congressperson who is ready to testify on your behalf.

The CHAIRMAN. I would like to invite, by the way interrupt, the Congressman to come join us up at the table here.

Senator HATCH. Please do.

The CHAIRMAN. I know when you come to the other body you are not looking to speak, but you are welcome to.

Mr. DICKEY. I am supposed to bow, is that right? [Laughter.]



Senator HATCH. Only to that side over there.

The CHAIRMAN. I realize that Bumpers probably got you in that habit, but it is not required. [Laughter.]

He probably didn't tell people that outside of Arkansas it is not required. [Laughter.]

Senator HATCH. Don't feel badly about the habit. I always bow in front of Dale Bumpers and David Pryor.

I want you to know that Senators Bumpers and Pryor are two great friends of mine and the members of this committee. We have great respect for both of them and we respect you and appreciate you being here as well. Welcome to the committee. We are grateful to have you here. We look forward to this hearing and hope it will be a pleasant experience for you and your family.

The CHAIRMAN. Now, the way we would like to proceed is ask, if you would, the senior Senator and all the delegation to make their introductory comments, and then we will invite you to be sworn in. We would like you to introduce your family to us at that point and then we will hear from you and then we will get to questioning.

I yield now to Senator Bumpers.

#### **STATEMENT OF HON. DALE BUMPERS, A U.S. SENATOR FROM THE STATE OF ARKANSAS**

Senator BUMPERS. Mr. Chairman, thank you very much for allowing my distinguished colleague, Senator Pryor, and me to appear here this morning. I especially thank you for what I think was an eloquent and well-reasoned, rational opening statement.

Mr. Chairman, I ask unanimous consent that my full statement be submitted for the record and I will simply extemporize my remarks.

The CHAIRMAN. Without objection.

Senator BUMPERS. First of all, it is very difficult to believe that a big bruiser like Webb Hubbell, who played on Arkansas' national championship team, and was a lineman for the Razorbacks and later drafted by the Chicago Bears, but chose law school instead—it is very difficult to believe that he is actually a very shy, reticent person.

But having said that, he is also a unique football player because his undergraduate degree is in electrical engineering, and when the Bears drafted him in 1970 he chose instead to go to law school, which he did, where he finished in 1973 and thereafter joined the Rose law firm, a very prestigious and prominent law firm in Little Rock, the same firm of which Hillary Clinton was a member.

Then he became a full partner in that firm in 1977. In 1979, he was elected mayor of Little Rock and served until 1981. Later on, in 1984, then Governor, now President, Clinton appointed him chief justice of the Arkansas Supreme Court, where he served with considerable distinction and respect.

He has been voted one of the best lawyers in America. Webb Hubbell has been voted one of the best lawyers in America for 4 years running now. He has been active civically as well as having been mayor. He has been very active in the Boys Club. He is a member of the University of Arkansas Medical Sciences Foundation.

Of course, I must confess to you that I have known his father-in-law and his mother-in-law better than I know him. His father-in-law is a good supporter, a pilot. He used to fly me around in my campaigns, and I think I knew him for some time before I realized Webb was his son-in-law. But be that as it may, then I got to know Webb.

I want to just make a couple of observations, Mr. Chairman, in regard to the flap surrounding this nomination. Webb Hubbell has been one of the most outstanding citizens not just of Little Rock, but of the State of Arkansas. He is extremely well known, as you might guess, having served as mayor of Little Rock. Not only have I never heard anybody attribute a racist remark to him; I have never heard anybody say a disparaging word about him.

Now, maybe that is because he is shy and reticent, but I prefer to think it is because he is an outstanding man and a fine citizen. You would have to go a long way in my State to find anybody who commands more respect both professionally and as a person than Webb Hubbell.

So, Mr. Chairman, his career has been exemplary from a professional standpoint and a personal standpoint, and finally I would like to say that he is the best friend—and I think this is probably true; I see it printed in the papers all the time and I think it is probably true. He is considered to be the best friend of both Bill and Hillary Clinton, two people whom I can tell you—in my 22-year public career, I have never known two people as consummately dedicated to racial justice as are Bill and Hillary Clinton.

I can tell you Bill Clinton would not have nominated Webb Hubbell, in all of the years of the close relationship they have had, if he had ever heard a racist remark or heard anything that bordered on bigotry or racial prejudice. As a matter of fact, I am going from here, Mr. Chairman, over to the Environment and Public Works Committee to introduce Rodney Slater as the new Federal Highway Administrator. Rodney Slater is a very prominent black man in our State.

The CHAIRMAN. There are a lot of Arkansas people being introduced these days.

Senator BUMPERS. Not nearly enough. [Laughter.]

As I said the other day, I am an unabashed Arkansan and I would like to see Arkansans fill every one of these jobs around here. We would all be a lot better off. But it is an honor and a pleasure for me to be here to say these—

Senator COHEN. Mr. Chairman, could we register a mild protest against that statement?

Senator BUMPERS. Mr. Chairman, would you try to control the members? [Laughter.]

I just want to say it really is a genuine respect, and I appreciate the attention of the members and the invitation to come here and say these things about this nominee.

The CHAIRMAN. Well, Senator, I know you do have other duties and other folks to introduce and you may not be able to stay. But before you leave, let me just suggest that I am happy that you set the record straight on Mr. Hubbell's football career. All this time, I thought he was a flankerback. I was worried. I doubt whether

you would find many folks wearing Texas uniforms that had nice things to say about him.

The last point I would make is you are always loyal to your good friend, David Pryor. I assume the reason why you want the world to know that Webb Hubbell is the best friend of the President of the United States is so all of us stop going to you and David for favors, but I understand that. I appreciate your setting it straight.

[The prepared statement of Senator Bumpers follows:]

#### PREPARED STATEMENT OF SENATOR DALE BUMPERS

Mr. Chairman, Senator Hatch, members of the Committee, I am happy and proud to be here today to introduce Webb Hubbell to you as you commence hearings on his confirmation as an Associate Attorney General of the United States. I have known Webb for many years and I can assure you that his intellect, his broad experience and his dedication to public service will make him an asset to the Department of Justice.

Webb first gained the admiration of Arkansans as a lineman for the University of Arkansas Razorbacks in the late sixties. He was a big, strong terror on the field, with a reputation for playing with injury and pain. His prowess on the gridiron gained the attention of the Chicago Bears, who drafted him in 1970. That must have been tempting to a young fellow who had never lived outside the South, but Webb had other plans. He earned his degree that year—a B.S. in Electrical Engineering, on time, despite the demands of the athletic field, and entered the University of Arkansas law school the following fall.

After graduating from the law school in 1973, he joined the Rose Law firm in Little Rock, where he began to distinguish himself from the start. In fact, by 1977 he had been made a partner. Webb left the Rose firm temporarily a couple of times. He served as Mayor of Little Rock from 1979 to 1981. In 1984 he was appointed to the Arkansas Supreme Court—as Chief Justice. The man who appointed him, now sits in the White House; the President has not made this nomination lightly. He knows what Webb Hubbell will bring to the job.

After his time on the Supreme Court, Webb returned to the law firm, where his success continued. In 1987, he became managing partner of the Rose Firm. He held that position until he resigned early this year to go to work in the Department of Justice, where he has worked around the clock for the last few months putting in place new leadership and coping successfully with the difficulties of the transition.

Webb has been a very successful attorney, listed in "Best Lawyers in America" for the last four years running. He has served on boards and commissions ranging from the Arkansas Arts Center to the University of Arkansas Medical Sciences Foundation to the Little Rock Boys Club. He has a beautiful family—his wife Suzanna and their children Walter, Rebecca, Caroline and Kelley are here today. I'm sure they are very proud of him.

For his entire adult life, Webb Hubbell has been a well-known success as an attorney and public servant in Arkansas. I know he will continue that success at the Department of Justice. He is superbly qualified for the job in experience and temperament. I urge you to recommend his confirmation. Thank you.

The CHAIRMAN. Senator Pryor.

#### STATEMENT OF HON. DAVID PRYOR, A U.S. SENATOR FROM THE STATE OF ARKANSAS

Senator PRYOR. Mr. Chairman and members of the committee, thank you very much for allowing me to participate in this hearing this morning. When we sat down just a few moments ago before this distinguished body, Mr. Hubbell leaned over to me and said, "You know, offensive lineman don't often get this kind of attention." Mr. Chairman, it is a real honor for me to come before this committee to give my unqualified support to the nomination of Mr. Webster Lee Hubbell to be Associate Attorney General of the United States.

I think that Mr. Hubbell is uniquely qualified, Mr. Chairman. His professional background makes him especially qualified for this



particular position. His breadth of experience has provided excellent training for the rigors of this post. I think it could be said that our President has chosen a big man for a big job. I would like to add, Mr. Chairman, that I think that he has chosen a good man for a big job.

I remember from the olden days—and I may be the only one who remembers this—an advertisement that used to appear in the magazines. I think it was for an oil filter; I am not sure which one. It had this kind of a big fellow and he had a red and white striped shirt and big, gnarly hands. I think it was advertising oil filters or piston rings or something. Regardless, the caption was, "Tough But Oh So Gentle."

I think that I might describe our friend, Webb Hubbell, as being tough, but oh so gentle. He is that type of individual who has inspired people, who has worked with people, who has led people, and who, as Senator Bumpers has just so eloquently stated, is truly one of the really great people of the State of Arkansas. He has been a leader in our State, he has been a leader in the bar, and he has been a leader in the community in every endeavor and in every field. I think anyone who looks at this record of distinguished service of Webb Hubbell will agree that he has the talent, he has the experience for this job, and, Mr. Chairman and my colleagues, he has the commitment.

Finally, Senator Bumpers has stated the other qualifications of this fine individual. I think that I would describe him as shy, very shy. He is quiet, he is thoughtful. He is also tough and he is fair and he is decisive. It is a real honor for me, Mr. Chairman, to give my unqualified support for this fine man and I am proud to sit at his side this morning. I thank you and I thank the committee.

The CHAIRMAN. Congressman Dickey, welcome, and we invite any comment you would like to make.

#### STATEMENT OF HON. JAY DICKEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ARKANSAS

Mr. DICKEY. It is a pleasure for me to be here and I want you to know I am Congressman from outside his district. I am in the Fourth District of Arkansas, but I am also one of those strange breeds. I am a Republican, and what I want to tell you about in this respect is that Webb Hubbell's qualifications and his goodness cross all lines. It is bipartisan. It just mandates a bipartisan consideration, and I am just privileged to be here to support his candidacy. He will not fail us in his duties as Associate Attorney General. Thank you for the time, Mr. Chairman.

The CHAIRMAN. Thank you very much. I thank all of you gentlemen. Obviously, you are welcome to stay, but I know you all have other duties. Thank you very much for coming.

Senator BUMPERS. Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Hubbell, would you stand and be sworn? Do you swear the testimony you are about to give will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. HUBBELL. I do, Senator.

The CHAIRMAN. Would you be kind enough to introduce your family to us before we begin?

**TESTIMONY OF WEBSTER L. HUBBELL, TO BE ASSOCIATE  
ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE**

Mr. HUBBELL. First, my wife, Suzanna.

The CHAIRMAN. Welcome, Suzanna.

Mr. HUBBELL. My first wife. [Laughter.]

My daughter, Caroline; my son, Walter; my daughter, Kelley.

The CHAIRMAN. Hi, Kelley.

Mr. HUBBELL. Not with us is my other daughter, Rebecca, who is taking a final today, unfortunately; Mr. Terry Collins; my cousins, Art and Ruth McKee; and my good friend, Joanne Hearst, from St. Louis.

The CHAIRMAN. Well, welcome, all, and I hope you will enjoy this proceeding, although anyone who enjoys a Senate committee hearing probably has some other things to consider. But having said that, Mr. Hubbell, we invite you to make an opening statement.

Mr. HUBBELL. Thank you, Mr. Chairman and members of the committee. I am very honored to be before you today and have appreciated the opportunity to visit with most all of you over the past few weeks and, in fact, months. I especially want to thank Senator Bumpers, Senator Pryor, and Congressman Dickey for their generous introductions, and my family and my friends for being here with me today.

It is an honor and a privilege to have been selected by Attorney General Reno and nominated by President Clinton to serve as the Associate Attorney General. When I was a boy growing up in the States of Arkansas, Tennessee, and Alabama, the Justice Department brought change for the better to my part of the country. The lawyers were the best and the brightest. They acted with courage and conviction in the face of adversity. It is a rare opportunity to be given a chance to work for an institution that I know from my own personal experience can be a force for significant change and progressive change.

I have learned during the past few months that the Department of Justice still represents the best and the brightest, and that it stands ready to be reinvigorated and redirected by Attorney General Reno. And if confirmed by the Senate, it will be the highest honor in my professional life to be a part of the Janet Reno Justice Department and the Clinton administration.

Senators, in the words of Micah, we should always do justice, have mercy, and walk humbly. And as the Senators have noted, it is very difficult for me to talk about myself, but for you to evaluate me, I want to give you a little bit of my background.

As a civil trial lawyer for 20 years, I have tried to use the law to do what is right for my client, whether that client be a large corporation, the Audubon Society, or one individual in a family dispute. I know firsthand that the cost of litigation has gotten out of hand, and I have had to tell clients, you simply can't afford to go to court, and I have seen their despair. Senators, we must have a civil justice system that works and allows all our citizens, regardless of their financial means, access to our system of justice.

As Chief Justice of the Arkansas Supreme Court, I have learned from the other side of the bench about the need for judges who are fair, have the appropriate judicial temperament, and have the req-

quisite experience and qualifications to serve as judges. I hope to bring my experience and insight to the Justice Department.

I have served as the chairman of the Arkansas Bar Association's Committee on Ethics for many years, and served on the Arkansas Ethics Commission, created by then Governor Clinton to draft an ethics and lobbying disclosure statute because there was none. When the legislature failed to enact this legislation, the Governor asked me to help in the effort to pass similar legislation through the initiative process, and I am especially proud of having been involved in that effort.

I believe that our public servants should have a heightened ethical obligation to the people they serve. Those who have the privilege of serving in the Justice Department should have the same heightened obligation to the American people to work for the cause of justice in an independent manner, free from political interference or abuse.

As mayor of Little Rock and as a member of Little Rock's City Board of Directors, I have worked with others to open up the doors which had been previously closed to both women and minorities, and on boards and commissions and in city management positions. I am very proud of the small role I may have played in bringing into city government Mahlon Martin, Susan Fleming and James Rogers.

But, Senators, I would like to speak to you a moment about the Country Club of Little Rock because it has become an issue. For years, I worked within the club and with the African-Americans in my community to bring about diversity in the club's membership. I believe we have made progress. As I have told the committee in my response to your questionnaire, I would have resigned immediately from the club if I believed that an application would have been rejected on the basis of race.

But several of you have asked whether I intend to remain a member of the club. I have not discussed this publicly before now because I wanted each of you to have an opportunity to judge my efforts in the past without consideration of my future plans, and I hope that I have satisfied you. And, Senator Biden, I appreciate your comments.

However, I have come to realize that there remains in the minds of some people the perception that my continued membership in the club reflects some lack of sensitivity. I think it is important that that perception not distract from the job that I hope you will allow me to undertake. Therefore, I have resigned my membership from the Country Club of Little Rock.

One of the gratifying things about this entire process, and I know some people think it is difficult, is that I have been reminded of the wonderful people who have touched my life over the past few years. The letters this committee and I have received in support of my nomination have strengthened my resolve and warmed my heart. These individuals and many others have been so generous and supportive in the past few weeks; they will never know how grateful I am.

I only hope that if I am confirmed, I will make them proud of me, proud of a Justice Department which will continue to open the doors through vigorous enforcement of the civil rights laws, a De-



partment which will do all that it can to protect the environment by the enforcement of its laws, a Department which will reinvigorate antitrust enforcement to promote competition and protect consumers, and a Department, with Janet Reno and Phil Heymann at the helm, which will make major strides in making our communities and children safe.

Senators, as a trial lawyer and a member of the Arkansas Supreme Court, I have loved the law. When I undertook public service, I still practiced law. I now face the exciting, challenging opportunity to merge my love of the law with public service.

Attorney General Reno has said to me and others who work with her, and she has said publicly that there is one threshold question at the Justice Department: What is the right thing to do? If confirmed by the Senate, I can think of no greater honor than to be able to work beside Janet Reno to try to do the right thing for our citizens and the causes of justice and equality.

Thank you.

The CHAIRMAN. Thank you, Mr. Hubbell. I respect your decision to withdraw from the club, but I hope it will not result in a diminution of efforts on the part of other members to have such a prominent, in terms of its exposure, institution in your largest city stop their efforts to continue to integrate the club even further.

I hope that no one feels that—again, I respect your decision, but speaking for me only—and as chairperson of this committee, I cannot speak for the committee; I am just speaking for me in my individual capacity as a Senator. It was not from my position necessary for you to do that. I respect it. I am not going to second-guess your judgment in doing it, but I hope you will encourage your friends who are still there to continue what you had underway.

Let me, if I may now, move on to some of the substantive issues that you are going to have to be dealing with, and one of the things that I would like to talk about with you, Mr. Hubbell, is the questions relating to the role of the Associate Attorney General. I mean, I want to get the sort of lines of authority more clearly established in my mind.

What substantive areas will you oversee within the Department?

Mr. HUBBELL. Senator, I will be overseeing the Civil Division, the Antitrust Division, the Civil Rights Division, the Environmental Division, the INS; in addition, the Office of Legislative Affairs and the Office of Legal Counsel. Mr. Heymann and I will have dual supervision authority over the Office of Policy and Development and the Office of Public Affairs. We will obviously be working with the Attorney General and Mr. Heymann and the assistant attorney generals in many areas. There is a lot of crossing over, but those are the primary areas that I will be supervising.

The CHAIRMAN. Will the assistant, as opposed to Associate—assistant attorneys general beneath the Associate Attorney General in the organization chart report directly to you or will they advise the Attorney General directly?

Mr. HUBBELL. Well, Senator, obviously, Janet Reno, the Attorney General, is a very hands-on person. She has a very open door and she will be—anyone is free to go directly to her anytime, anybody in the entire Justice Department. But on the day-to-day activities, they will go through me.

The CHAIRMAN. How will responsibility for decisions be delegated when an issue is substantively mixed; that is, for example, a criminal civil rights violation? Will you or will the Deputy Attorney General have the responsibility for advising the Attorney General on that matter, or is there no clear line?

Mr. HUBBELL. Senator, at this time there is no clear line. I have had the pleasure of meeting and beginning to work with Phil Heymann in the past few weeks and we look forward to working together very, very closely, and so there are no clear lines, but we will obviously be consulting with each other on those types of issues.

The CHAIRMAN. Well, one of the things as this administration progresses that makes life easier for us in dealing with the Attorney General—and some of us have been here for a lot of Attorneys General, more than Presidents—is to be able to know who has what authority within the Department to make life, quite frankly, easier for the Attorney General in terms of oversight proceedings, having folks coming up here to testify.

So as these lines, some of which are necessarily muted, become a little brighter—and as I get the picture from my discussions with Professor Heymann, you are going to assume some collegiality here rather than very, very stark divisions on overlapping jurisdictions. Am I correct in that view?

Mr. HUBBELL. You are correct, Senator.

The CHAIRMAN. Well, as they develop, it is useful for us to know that and for our staffs to know that so we can—quite frankly, I think it can make life easier for you all, rather than have redundancy from this committee of the House Judiciary Committee on matters affecting policy.

Very quickly, independent counsel. The Attorney General has been straightforward on her view that there should be an independent counsel and it should not cover the Congress. Phil Heymann testified yesterday that that was his view. Is your view the same? If not, how does it differ?

Mr. HUBBELL. Senator, my view is the same as the Attorney General and Professor Heymann.

The CHAIRMAN. Now, one of the things we discussed at length yesterday, the distinguished Senator from Pennsylvania and to some extent the distinguished Senator from Maine and I, was the appropriateness of contacts between Members of Congress and the Justice Department. You first came to the attention of a lot of us, notwithstanding your outstanding record, but some of us didn't become acquainted with you until Congressman Ford and the location of his trial—I might add he was found not guilty on all charges—leaped into the news.

It has been widely reported that you set up a meeting between members of the Congressional Black Caucus and then-Acting Attorney General Stuart Gerson, who is no longer with the Department. Yesterday, we discussed with Professor Heymann the distinction between a Member of Congress contacting Justice Department officials about a specific case and a Member contacting Department officials about policy that may affect a number of cases handled by the Department.

Professor Heymann agreed that the Department would develop, and should develop, a written policy on this question. Will you support Professor Heymann's efforts to develop a formal departmental policy regarding congressional inquiries, or do you think it is necessary?

Mr. HUBBELL. Senator, I was made aware last evening that Professor Heymann had said he would commit and give this committee and the other Members of Congress written policies, and I believe it is a good idea. Obviously, there are times that Members of Congress need and should talk to the Department of Justice about policy, and in those instances we want you to be clear on those guidelines and we will commit to give those to you in writing.

The CHAIRMAN. After Congressman Ford was acquitted of all charges, former Acting Attorney General Stuart Gerson wrote an op ed piece in the Wall Street Journal in which he described the rationale for his decision to direct the Justice Department to reverse its position on a motion to strike the jury. Mr. Gerson wrote, "The decisions I made in this case," referring to the Ford case, "were mine alone without any attempt by purported agents of the White House, including its nominee Webster Hubbell, directly or indirectly to exert influence." It sounds like a question that need not be asked, but for the record is that accurate?

Mr. HUBBELL. For the record, Senator, it is completely accurate.

The CHAIRMAN. Mr. Gerson was appointed by former President Bush and he was serving in the Department at the time of the meeting with the Congressional Black Caucus because President Clinton had not yet appointed his own Attorney General. In short, this Bush appointee took full responsibility for the decision in the Ford case. Once again, for the record, was Mr. Gerson correct when he wrote that you did not attempt to influence the decision in any way?

Mr. HUBBELL. Senator, he is correct.

The CHAIRMAN. Do you have anything you would like to add to shed light on any of these facts?

Mr. HUBBELL. Senator, for those of you who may know Attorney General Gerson, you know that he is a man of strong conviction and that this was his decision. He certainly talked to me about it, but he made the decision, as he talked to many others about the possibility of having to change, or request a change, along with the attorneys for Congressman Ford.

The CHAIRMAN. Another area that is offered as a strength and suggested by some as a possible weakness of your appointment is your close personal relationship with the First Lady and the President of the United States. Some have suggested that that goes to your ability to be independent of the White House and the unique position the Justice Department holds in being required to have an additional bit of independence relative to other Cabinet positions.

Mr. Hubbell, as I said, I know that you are a longtime friend and colleague of both the President and the First Lady, and you are a person in whom they obviously place enormous trust, since they asked you to act as the liaison between the White House and the Justice Department during the days prior to the Attorney General's confirmation.



Press reports suggest that you have continued this role, at least informally, on critical matters such as the Waco incident. Will you continue to play the liaison role between the White House and the Department of Justice if you are confirmed for this position?

Mr. HUBBELL. Senator, the communications between the White House, and that being various members of the White House, and the Justice Department need to have strong and very clear lines. Professor Heymann and the Attorney General and I have discussed that. Communications from individuals from the White House to the Department of Justice will go through White House counsel, and similarly communications back to the White House will go through Attorney General Reno, Professor Heymann, or myself, so that we know what those communications are. We will certainly be consulting with White House counsel and try to make clear that there is no attempt to politicize in any way the Justice Department.

The CHAIRMAN. You are going to oversee the Office of Legal Counsel, is that correct?

Mr. HUBBELL. That is correct, Senator.

The CHAIRMAN. Assume for a moment that you received a call from someone in the White House asserting that an opinion about to be issued by the Justice Department's Office of Legal Counsel was in conflict with one of the President's priorities. How would you proceed?

Mr. HUBBELL. First of all, Senator, if that call came from anyone other than White House counsel, I would refer that person back to White House counsel. That is the policy, as I understand it, that we are working out with White House counsel. But I would also say that that person should not make that call.

The CHAIRMAN. Will OLC opinions in the Reno Justice Department be made directly to the Attorney General or to you in the first instance?

Mr. HUBBELL. Senator, that has not been discussed yet with the nominee for OLC or the Attorney General, but I am assuming that they will go to both the Attorney General and myself.

The CHAIRMAN. If you are overseeing the Department, it would be kind of hard for them not to go to you, it seems to me.

Mr. HUBBELL. That is correct, Senator.

The CHAIRMAN. I mean, I don't know how you could oversee the Department and not have access, at least contemporaneous with the Attorney General knowing whatever the recommendation is.

Mr. HUBBELL. That is correct.

The CHAIRMAN. Let me move on before my time is up. Well, actually, why don't I yield the remainder of my time and yield to my colleague. I will have time to come back.

Senator Hatch.

Senator HATCH. Well, thank you, Senator Biden. Mr. Hubbell, I have to tell you that Stuart Gerson called me about the Little Rock problems, and his discussion with me paralleled what you have said here today. I happen to think he did a very good job both before this administration took over and afterwards, and he is a person of very strong feelings and very high ethical and legal character. So that has never been a problem to me.

There has been, however, some press speculation that the Clinton administration will try to "clean out" some of the career lawyers that the Reagan and Bush administrations hired for certain offices in the Department, including the Office of Legal Counsel, the Office of Policy Development and, of course, the Office of Legislative Affairs. In fact, someone that President Clinton has nominated as Assistant Attorney General is on record as saying that the Justice Department needs to be cleaned out "not with a broom, but with a pitchfork."

Can you assure me that the Clinton administration will not politicize the Department by retaliating against career lawyers simply because they were hired by preceding administrations?

Mr. HUBBELL. Senator, I can make that assurance to you. We have no intention of clearing out the Justice Department of career lawyers.

Senator HATCH. Thank you. I appreciate that because I think if we don't have that kind of an understanding, something would be wrong.

What role did you play in the decision to seek the resignations of all of the U.S. attorneys effective at the end of March of this year?

Mr. HUBBELL. Senator, I was aware that representatives of President Bush had notified the U.S. attorneys, the political appointed U.S. attorneys, to anticipate receiving a request for letters of resignation immediately after the inauguration. Obviously, events changed that, and after the Attorney General and the President had decided to ask for letter of resignation, I was asked to gather together the information on all the offices so an orderly transition from the political appointees to career prosecutors could go forward.

Senator HATCH. Did anybody outside of the Department of Justice talk to you about seeking those resignations?

Mr. HUBBELL. Outside of the Department of Justice?

Senator HATCH. Yes.

Mr. HUBBELL. No, Senator.

Senator HATCH. Nobody did. Did this process then initiate with the Attorney General herself?

Mr. HUBBELL. Senator, it is my understanding that it was a joint decision of the President and the Attorney General.

Senator HATCH. OK; did you or the Attorney General ever consult with the executive office of U.S. attorneys in the Department prior to finalizing the decision to seek these resignations in this manner, or was the office merely informed of the decision?

Mr. HUBBELL. Senator, we obviously consulted with the offices of the U.S. attorneys because they are the ones who provided us all of the information, and worked with them in trying to ensure that there was an orderly transition.

Senator HATCH. I understand that there are a number of U.S. attorneys who were given some time, and certainly our one in Utah was given some time so he could complete two trials, and I appreciated that. I personally spoke to the Attorney General about my concern for the continuity of the U.S. attorneys there as well as elsewhere, and I am grateful for that because I think it did allow some continuity.

But several U.S. attorneys have complained to me that the abruptness of the announcement was disruptive, and it is hard for me to think how anybody could think otherwise, in all honesty. It is unsettling when the heads of U.S. attorneys' offices get a letter that sounds like they need to clear their desks immediately, or even on shorter notice. Indeed, as you know, a number of them left fairly abruptly. What consideration was given to the disruption that would be caused by the abrupt request that was made of them?

Mr. HUBBELL. Senator, as I have said earlier, all of the U.S. attorneys were notified in December to expect to have their resignations asked for on January 21. The first contact was not by letter. It was by a telephone call because the Attorney General did not want any U.S. attorney to read about the request in the paper, so each one was called, I believe it was either Monday or Tuesday. And then we tried, as there were individual circumstances in the particular office such as a trial, to work with that office to ensure as least amount of disruption as possible.

Senator HATCH. Did the administration have permanent replacements in mind at the time that they asked for it, or were you just counting on having acting U.S. attorneys from the career employees?

Mr. HUBBELL. Senator, there are some individuals who have been recommended by the Senators in their States who are going through the process right now of getting their paperwork together and, upon that paperwork being completed, would be put in as the acting U.S. attorney. That has not occurred yet, so in the States or in the districts where an acting U.S. attorney has been appointed, they are career prosecutors.

Senator HATCH. All right. One of the questions that rose in my mind was why didn't the administration wait for successors to be nominated and confirmed before disrupting the offices by leaving them in the hands of caretakers, or even senior career service people?

Mr. HUBBELL. Senator, that decision was made a long time ago, but the thought was that we wanted to put in place career prosecutors, as there is—throughout government when there is a transition, most all political appointees are asked for their resignation, and they were in this case. Even in the Justice Department over, I think, 90 political appointees did resign on January 21 or shortly before that. So it was consistent with Janet Reno wanting to put her team in place and leaving it in the hands of career prosecutors until that change has occurred. At the current time, there are still 35 politically appointed U.S. attorneys in place.

Senator HATCH. Well, see, one of the problems that bothered me—and the reason I am going over this is, you know, for both past and future reasons. Here is a Department that had one Attorney General-designate withdraw during her hearings, another near nominee withdrew even as her nomination was being reported in the press, and finally one confirmed Attorney General. It took even longer for other nominations for lower-level positions in this Department to be announced. In fact, as I understand it, the Assistant Attorney General in charge of the Criminal Division is still not



nominated at this point. Maybe I am wrong, but that is my recollection.

Yet, experienced leaders in the fight against crime were told basically to get out in short order, and it may very well have been within the President's authority. In fact, I have said to people, well, he has a right to do that. The question is was it well-advised, and I just want people to think about that in the future because I think that continuity was very important and it was ill-advised to do that.

Do you understand how that action not only adversely affected law enforcement, but also makes Federal law enforcement look highly politicized?

Mr. HUBBELL. Senator, again, as you look at it, we will certainly take a look and see what happened. We tried our best to put in career prosecutors, the best person in the office, and we will evaluate now how that process worked.

Senator HATCH. All right. Well, I appreciate that. I am not trying to blame you for it. I am just saying that it is something that bothered a lot of us up here on both sides of the floor because it is one thing to make an orderly transition; it is another thing to just throw people out, even though most of them are pretty dedicated people.

The CHAIRMAN. Will the Senator yield for 30 seconds on that?

Senator HATCH. Sure, I would be glad to.

The CHAIRMAN. I share the concern of the Senator from Utah, and I have made no secret of that. But I would note that although it wasn't done the same way, President Reagan had 50 interim appointees, and so far you all have had 44. At least in my State and others, I have suggested that we reappoint the Republican U.S. attorney, and you have agreed to do that, wisely, I believe.

But I think as a general policy, I hope you will go back and take a look at it and, some time within the next year, report to us as to what effect it had, if any, from your perspective.

Senator HATCH. I think that is a sound request. I would like to see that, too, because I don't want to see future administrations, whichever they may be, just automatically stopping the work of law enforcement, or at least in the sense of just automatically asking for the resignations of all U.S. attorneys, many of whom really are very dedicated public employees. Nor am I trying to pick on you in the process. I just want to get those points across that that has bothered a lot of people up here.

Let me just move on to another aspect. Nor am I trying to say the Reagan and Bush administrations did everything right either. We all know that there were mistakes there as well.

For fiscal year 1993, Congress appropriated most of President Bush's \$11.2 billion budget request for the Department of Justice. Despite the crime problems that our Nation faces, President Clinton's first budget cuts, the number of Justice employees—that first budget cuts them by close to 2,000 people. The U.S. attorney's office takes the biggest staff cut. Over 450 prosecutors and support staff have been cut from the budget. As well, the U.S. Marshals Office has been cut by over 100 positions. Long-term budget numbers indicate a substantial cut in spending for prison construction. How do you explain these cuts in the President's budget-cutting process?

Mr. HUBBELL. Senator, as all of you are aware, these are very difficult budget times and we have in the Justice Department—trying to work within the Department to ensure that it does not affect law enforcement, and yet comply with the need to reduce the deficit and to cut, where necessary, administrative and personnel cost. We hope, through attrition and other innovative ways, to actually do a better job, and that is what our goal is. We have to look at it, and look at it very hard.

Senator HATCH. Well, I appreciate that, but what it appears to me and to many others is that this administration is expecting a lot fewer Federal prosecutions. I don't think there is any way that that is possible, and if we make it so that they can't do the job of law enforcement in this country because there aren't enough people there or enough money behind them or enough tools to be used, then we are all going to be pretty sorry people.

I just mention it to you to watch it because this is one area where we can ill afford cutting back too far. Many feel there are a lot of other areas, but there are very few in this country that meet the exigent and urgent needs of the populace as much as these positions I have been talking about.

President Clinton promised to place 100,000 police officers on our Nation's streets. His 1994 budget included a so-called Federal-State partnership program which would authorize \$100 million for law enforcement programs that for the most part are currently authorized and funded under the existing \$900 million State and local law enforcement block grant program.

Now, despite strong congressional support for this program, the President's current budget only funds half of this program. Now, I would like to know why the Department has chosen to duplicate existing programs, thereby adding to the bureaucracy, rather than build upon a proven, existing grant program which the law enforcement community already supports and which in many ways may do even a more important job.

Mr. HUBBELL. Senator, it is the goal of Attorney General Reno and Phil Heymann and myself to take a very hard look at the Justice programs it is funding to find ways to live up to the President's commitment. We intend to do that. We are not in place like we should be yet, but we intend to look at this very hard and try to meet the President's goals.

Senator HATCH. Well, my time is up, Mr. Chairman, so I will be happy to yield at this point. Thank you, Mr. Hubbell.

The CHAIRMAN. Thank you.

Senator Kennedy.

#### OPENING STATEMENT OF SENATOR KENNEDY

Senator KENNEDY. Thank you, Mr. Chairman, and welcome, Mr. Hubbell. I will just offer a very brief comment on the issue of the club, and then ask some questions. It is clear to me that Mr. Hubbell complied with our club policy by trying hard to change things from within. He fought hard to integrate the club and he achieved some success, and I do not think resigning affects the merits of his position, quite frankly, one way or the other. If I thought that he had acquiesced in discrimination, I would oppose him. But he did not; he sought to eliminate any appearance of it. Resigning may

help to bolster public confidence in the Justice Department because the club membership has been called into question. So if Mr. Hubbell wants to resign, that is fine with me.

As the principal sponsor of the committee's resolution on discriminatory clubs—I worked very closely on that with Senator Metzenbaum and others on the committee—I think it is useful to describe what our objective was. Clubs where business is done that discriminate against minorities or women deprive them of a meaningful opportunity to participate in the economic life of their community. It is wrong for members of the bar to acquiesce in discrimination of any kind, especially discrimination that deprives people of any significant opportunities.

This committee has dealt with this issue many, many, many times over the years, and in August 1990 we adopted a resolution to give clear guidance to the bar about what we expected of them. That resolution, which took effect in January 1991, expresses our view that it is inappropriate for persons who want to serve in the Justice Department or on the Federal bench to belong to discriminatory clubs unless, and I quote, "such persons are actively engaged in bona fide efforts to eliminate the discriminatory practices."

In passing that resolution, we sent a message to the members of the bar: If you belong to a club that may exclude people on the basis of race, religion, gender, ethnicity or handicap, work within the organization to end the discrimination or quit. Often, the only way to break down the barriers of discrimination is to work hard on the inside to change things. It seems to me that Webb Hubbell did just that.

My question is: Would you describe for us your efforts to recruit African-Americans for the club?

MR. HUBBELL. Senator, my efforts from within were twofold; one, to meet with members of the club, with the board members of the club, to write a letter to the board of the club to encourage active recruitment. That was what I did from within, and then when we finally had an applicant to hopefully build total support for his application and membership.

Then, outside was to visit with—to talk to African-Americans that I knew well personally to solicit their views about the club, to solicit their potential interest about the club or to solicit other people who might be interested in the club.

SENATOR KENNEDY. Well, I believe the evidence is clear both in terms of your response and from the information received by the committee that for years you quietly approached your many friends in the African-American community in Little Rock and sought to encourage African-Americans to apply to the club.

Howard Reed, the first African-American admitted into the club, recalled conversations with you over a long period of years in his letter to the committee.

There were times when Webb specifically inquired about my interest in golf and tennis. Given the tone and the way in which he made those comments, it led me to believe on more than one occasion that he was about to shift the discussion to my interest in becoming a member of the club, but I would purposefully redirect the conversation. In the spring of 1991, I agreed to allow my name to be submitted for membership. When Webb learned of my decision, he clearly was very pleased and he assured that I and my family would really enjoy our membership, and was cer-



tain that I and my family would be welcomed enthusiastically by all. It should also be noted that I and my family and many other nonmembers of the club had visited the club as guests of members for many years prior to my becoming a member, and I have always experienced only the most gracious hospitality.

Mr. Mahlon Martin, who was hired by you as the first African-American city manager of Little Rock when you were mayor, wrote the committee, "I am personally aware of Mr. Hubbell's interest in attracting minority members for club membership dating back a number of years."

Ruppert McGee, a member of the Arkansas Legislative Black Caucus, wrote to the committee:

For several years that Webb Hubbell was a member of the club, he sought radical changes in their philosophy and social practice. He was a champion of change while working within the rigid structure of that organization.

Thedford Collins, an African-American who was a former deputy director of the State Department of Human Services, told the Arkansas Democrat Gazette:

I did have some discussions about the club with Webb and some other people who, for a number of years, were asking about people who might be interested and how something could happen to break down that barrier. They were actually soliciting me for names of other people.

Here again I believe in terms of your response to the committee and earlier information, it is clear that for several years you actively urged the club's leadership to recruit African-American members. We have letters and statements from numerous members that confirm it.

Dr. Henry Thomas wrote to the committee:

Since the late 1970s, Webb has frequently stated his belief that the club should take black members and he has discussed this with many members of the board. Webb has used his influence on the other members to bring our first African-American member into the club and he has stated for years that there should be several black families admitted.

W. Jackson Williams, president of the club in 1991 and 1992, wrote to the committee:

Some time previous to Mr. Reed's application, Mr. Hubbell, who is a friend of mine, communicated to me his belief that the club needed to consider the admission of members of our black community into the club. I know for a fact he did, in fact, communicate similar views to other board members.

Michael Schafel, a member of the club, wrote to the committee:

Webb and I have had several discussions about the need to have more black members in the club. These discussions started as far back as 1987. Webb remained committed to trying to get black members in the club. Although he would never tell me who, he did tell me that he had asked some individuals about their interest in becoming members of the club.

Timothy Farrell, another member of the club, wrote to the committee:

As a personal friend and a fellow member of the club, Webb has visited with me on numerous occasions about the need for our club to admit black members. Although I cannot cite dates and times, I am aware of his work behind the scenes to get this done.

Wickliffe Nesbitt, another member, wrote the committee:

I can testify without hesitation that Mr. Hubbell discussed with me and other members the need for the club to recruit and admit minority members. We discussed efforts we could make to encourage minority members to become interested

in making application to the club. Our discussions occurred periodically beginning in the early to mid-1980's and continued until he left for Washington.

All of this makes clear that you did actively engage in good-faith efforts to integrate the club. Your efforts have met with some success and you should be praised, not punished, for your actions.

Let me turn to another area, immigration issues. Part of your duties as Associate Attorney General will be day-to-day oversight of the Immigration and Naturalization Service and the Department's immigration judges. As you know, our Immigration Subcommittee has a hearing on terrorism and the asylum system scheduled for May 28, and we look forward to the Department's thoughts on those subjects. I look forward to working with you on the various challenges before the Immigration Service and the Justice Department.

I want to express my appreciation to Senator Simpson, who is the ranking minority member. He was prepared to have legislative action in an area where he has strong convictions, and I asked him to at least defer legislative action until we had an opportunity to hear from the Department and I am grateful to him for his accommodating that request, and we certainly look forward to the Department's testimony.

As you know, INS has been a backwater agency of the Justice Department. The INS budget is \$1.5 billion. It has 14,000 employees, 15 percent of the Department's budget and personnel. Last year, INS granted 1.8 million green cards, processed 19 million visitors, removed 1.2 million illegal aliens, and seized \$1 billion in illegal drugs. At the same time, the agency faces major management challenges. There are huge backlogs in processing applications for asylum, permanent residence, and even naturalization. It takes over a year to get citizenship. The excellent new Asylum Corps inherited a huge backlog and it is getting further and further behind. The Border Patrol has to do a thankless job with outdated equipment and inadequate training, and there is a huge burnout rate.

I am wondering if you can indicate to us that should you be confirmed, and I am confident that you will, that you will give this issue your careful attention.

Mr. HUBBELL. Senator, should I be confirmed, you can be assured that it will get my attention and the attention of the Attorney General and the Clinton administration. They recognize that this is an area that needs immediate and significant attention.

Senator KENNEDY. Mr. Chairman, my time has just about expired.

The CHAIRMAN. Thank you, Senator, and thank you for laying out on the record what I was going to submit for the record, the actual—

Senator SIMON. Mr. Chairman, could I ask my colleague to yield 30 seconds?

The CHAIRMAN. You can, but if you could hold for just 2 seconds, I would like to introduce—there are a lot of former mayors of Little Rock here. Lottie Shackelford is here. Would she stand and be recognized? Welcome. It is good to see you. I think there have been more mayors of Little Rock than there are citizens of Little Rock.

But all kidding aside, welcome, Lottie, and it is good to see you here and thanks for coming.

Senator.

### OPENING STATEMENT OF SENATOR SIMON

Senator SIMON. Mr. Chairman, I have to chair a hearing.

The CHAIRMAN. Please.

Senator SIMON. I simply want to say not only do your two Senators from Arkansas speak publicly very highly about you; they do so privately also. And Congressman Ray Thornton has as well. If I could just tag on to what Senator Kennedy said on INS, I think that when that person is appointed to head INS, I hope it will be someone who has some experience in the field. I think it is really important in a very complex area that we get someone with experience.

Then, finally, on the club membership, as one who has pushed in this area, and I think properly so, I appreciate the fact that you are resigning. There is no question you met the minimum requirements of this committee without resigning, but I think we have to do more than just meet minimum requirements in this day and age. I think we have to make gestures that show that we are going to reach out and give opportunity and justice to everyone in our society, and I simply want to commend you for what you have done. I appreciate it.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Cohen.

### OPENING STATEMENT OF SENATOR COHEN

Senator COHEN. Mr. Chairman, I must say I like the early-bird rule that you have adopted.

Senator SIMPSON. I think it is terrible.

The CHAIRMAN. Well, I don't think I actually adopted it, but your colleague—go right ahead.

Senator GRASSLEY. Will that be the rule from now on? It is OK with me if it is. I just want to know that we are following the rules consistently and if there is a change of rule it is going to be permanent, or is it just for 1 day?

Senator LEAHY. It is flexible.

Senator GRASSLEY. We have got to be able to plan from one committee to the other. I don't care how it is. I prefer the early-bird rule, but if it is not going to be the early-bird rule every day, I don't think it should be at all.

Senator COHEN. Mr. Chairman, I yield to Senator Simpson.

Senator SIMPSON. Well, Mr. Chairman, I think in this instance Senator Cohen was here, and I respect that. I don't want to get into controversy. We all get it done eventually. If you want to be here, we will get it done.

The CHAIRMAN. What I would suggest is that we proceed that way today, and I promise you what we will do by the next meeting is we will adopt formally a rule and whatever the will of the committee is, we will proceed in that way.

Senator SIMPSON. If I can always, Mr. Chairman, just precede Senator Kennedy, that would be perfect. [Laughter.]



Senator KENNEDY. Don't put that to a vote, Al.

Senator LEAHY. It doesn't work, Al, even for those of us who get here ahead of him.

Senator COHEN. Mr. Chairman, I promise to arrive late next time to avoid this controversy.

Mr. Hubbell, until Senator Bumpers endorsed you, I was inclined to support your nomination, but I am giving it serious reconsideration now. [Laughter.]

On a more serious note, I want to suggest one of the reasons why there has been so much concern raised on the issue of club membership. I am sure that you are familiar with the expression that revenge is a dish that is best served cold. There is some suggestion that Republican members have been less than enthusiastic in going after nominations submitted by President Clinton when, in fact, had it been President Bush or another Republican who had submitted similar nominations, they would have been attacked rather vigorously by members on the other side.

I am mindful, for example, of Senator Tower, a very close and good friend of mine who I felt was unfairly attacked during his confirmation proceedings with allegations, for example, that he had, if not a conflict of interest, having represented several defense contractors in the past, at least the appearance of a conflict of interest. Yet, of course, we recently had the confirmation hearings of two officials within the Defense Department, John Deutsch and Bill Perry, both outstanding candidates, who also had substantial contacts and contracts with defense firms, and yet not a hint or a whisper of impropriety was suggested.

If a Republican had belonged to a club that did not admit blacks, Hispanics or members of the Jewish faith, he automatically would be labeled a racist. For example, we have the nomination of the GSA administrator who is a Republican coming up, and one of the letters going out by the executive vice president of a labor group that represents Government employees indicates, "Mr. Johnson will continue to belong to the Republican Party and continue to be a member of the all-white Lincoln Club." The implication is that somehow he is involved in a racist policy. So that is the reason why I think some of us feel compelled to at least pursue this issue in a bit more detail.

I must tell you the only club I have ever belonged to is the Senate, and it is not very clubby any longer, if it ever was, and I have no control over the membership. None of us do. We can't exercise vetoes.

My understanding is that you joined the country club back in the late 1970's, correct?

Mr. HUBBELL. That is correct, Senator.

Senator COHEN. I assume it was because you wanted to play golf and tennis?

Mr. HUBBELL. Along with my family, Senator.

Senator COHEN. Along with your family, and I assumed also that it is a very good place to make social contacts. You were a lawyer at that time, a practicing lawyer?

Mr. HUBBELL. Senator, I have been a lawyer since I graduated from law school and practiced actively for 20 years.

Senator COHEN. But you would agree that is the place where you make social contacts. You enjoy the swimming and the golf and the tennis, but you also enjoy the members' fraternity, as such, and it is a good place to make contacts, is it not? Is that a fair statement?

Mr. HUBBELL. I have many friends at the club, yes, Senator.

Senator COHEN. OK. At the time that you joined, it was, I assume all-white membership?

Mr. HUBBELL. Yes.

Senator COHEN. No members of the Jewish faith?

Mr. HUBBELL. That is not correct, Senator.

Senator COHEN. Pardon?

Mr. HUBBELL. That is not correct, Senator.

Senator COHEN. That is not correct?

Mr. HUBBELL. No, Senator.

Senator COHEN. There were Jewish members at that time?

Mr. HUBBELL. Yes.

Senator COHEN. OK. Any Hispanics?

Mr. HUBBELL. No, Senator.

Senator COHEN. OK. Do you think that the exclusion or the non-presence of African-Americans was by design or benign neglect, if I can use that old phrase?

Mr. HUBBELL. Senator, it would be hard for me to discuss it back in 1978 because I wouldn't have known. I think in later years it was because of a lack of a true, active effort to recruit minorities in the club, and that is what I attempted to do.

Senator COHEN. I am not talking about your efforts. I am talking about the membership itself, the board of directors. Was the exclusion or the nonpresence of blacks at that time, do you think, by design, active opposition to allowing minorities in, or simply by indifference to the social problems?

Mr. HUBBELL. Senator, I am convinced it would not be out of an active design. I would not have been a member of the club if it were by active design.

Senator COHEN. All right. So, in other words, there were no black members simply by virtue of the fact that blacks did not want to join the club?

Mr. HUBBELL. Senator, I don't know back in 1978. Howard Reed was the first application in 1992 of an African-American member.

Senator COHEN. As a matter of fact, this club's policies really came to light as a result of President Clinton, then candidate Clinton, campaigning for the Presidency back in the fall of 1992. Is that not right, or earlier perhaps? That is when the policies first erupted to public notice because candidate Bill Clinton had to apologize. As I recall, he apologized for playing golf because of the adverse publicity that was then given to the club. Now, following that adverse publicity, that is when the first admission of an African-American took place. Is that not right?

Mr. HUBBELL. Senator, after the President played golf in early 1992, Howard Reed was admitted.

Senator COHEN. Right.

Mr. HUBBELL. His name had already been before the board and we were actively working to get him in the club prior to the golf game.

Senator COHEN. How long does it take to get into the club once you apply?

Mr. HUBBELL. Senator, there have been times when the waiting list has been 6 years.

Senator COHEN. 6 years?

Mr. HUBBELL. Yes.

Senator COHEN. I take it that the club doesn't recruit members, but simply either approves or rejects applications?

Mr. HUBBELL. That is correct, Senator.

Senator COHEN. You started, I think, actively recruiting or seeking out blacks to join the club in 1985?

Mr. HUBBELL. That is correct, Senator.

Senator COHEN. Is that because the membership was becoming more tolerant at that point or you felt that you had acquired sufficient credibility with the board members that you could do that without fear of any repercussions? Why wait from 1978 until 1985?

Mr. HUBBELL. Senator, I obviously was talking to members prior to 1985, but I felt by 1985 that the board was not making active efforts to recruit and I felt that I was now a little bit older. I was almost—well, I was over 35 by then, and that I would have a better—I would better be able to actively recruit and be listened to more because of some of the things I had done in my life.

Senator COHEN. In other words, the answer to my question was, yes, that after having been a member since 1978 and accumulating some years of membership or seniority, you felt that the members or the board of directors would attach more credibility to your active solicitation of blacks at that time than had you been a brand new member.

Mr. HUBBELL. I believe that is correct, Senator.

Senator COHEN. I think you did indicate in a letter to Senator Metzenbaum that you would resign if the club had ever turned down an application of an African-American for membership, correct?

Mr. HUBBELL. That is correct, Senator.

Senator COHEN. Did you ever indicate to the board of directors or other members that you would resign from the club if they ever did that?

Mr. HUBBELL. Senator, I can't recall one way or the other. I know I had lots of conversation with board members. I feel comfortable that there would be many members—that if there was an exclusion on the basis of race they would leave.

Senator COHEN. Who is Daniel Bowman?

Mr. HUBBELL. Senator, I do not know.

Senator COHEN. According to press accounts, and I don't know this for a fact, he is the manager and chaplain of the Little Rock chapter of the NAACP.

Mr. HUBBELL. I have read that, Senator.

Senator COHEN. You don't know him?

Mr. HUBBELL. I don't know him well at all. I may have heard the name and I may have met him when I was on the city board, but he is not anyone I know well.

Senator COHEN. He has made some pretty serious charges that you have been less than candid or truthful in your statements



about efforts to seek admission for African-Americans. He is completely wrong? He is lying?

Mr. HUBBELL. Senator, I don't use those words. I don't know Mr. Bowman. I don't necessarily believe everything I read in the paper these days.

Senator COHEN. All right. That is fair enough. What about the Little Rock chapter of the NAACP? Do you know whether they support your nomination or oppose it?

Mr. HUBBELL. Senator, there have been some wonderful letters sent in from a lot of my good friends back home. I don't know what any of—what that Little Rock chapter's position is.

Senator COHEN. All right. I would like to continue on this issue of racism, if I could, because I think it is an evil that is deeply rooted in many societies, and I might say including our own in this country. While we have perhaps made great strides in the field of civil rights—and you are going to be in charge of the Civil Division—the fact is that racism exists. It is perhaps less overt. It may be more subtle. It is no less evil or immoral, and I think it is quite pervasive.

I was very impressed with a program—I am not sure which network put it on—a year or two ago in which they took two graduates, one white, one black, both males, both equally attractive, well-dressed, and they sent them on a series of meetings. The first place they went to, as I recall, was an auto dealership. As the black individual walked in, he was completely ignored. No one waited on him, and he waited for minutes, if not much longer than that. No one came to him, including even a black salesman. The moment the white graduate walked in, they couldn't get there fast enough to start offering him opportunities to purchase an automobile.

The second place that they went to, I think, was a jewelry store or some commercial enterprise, and the minute the black individual walked through the door, a security person started following him around. Again, he was well-dressed. It was not as if he was coming in off the street as a homeless individual who might be trying to steal something, but he was immediately followed, and again not well received compared to the white graduate.

Finally, Mr. Chairman, they went to an apartment building in response to an ad. When the African-American went in to apply for the apartment, they said, sorry, the last one just went moments before you got here. When the white individual walked in, they said, here is an apartment for you.

I think it is pretty clear that racism still exists, I could also point to the college campus which we look to for the future of our society, and we find that there we have even more problems to contend with. For example, we have Prof. Leonard Jeffries in New York, where there is considerable controversy over his speeches, in which action is being taken to deny him a certain position.

We have the University of Pennsylvania where the speech code is, according to some, too restrictive, where a black female student was referred to as a water buffalo and the other student claims it had no racial overtones. The State University of New York is now grappling with the propriety of providing the local police with a list of its black male students in an effort to locate a suspect in an assault.

Now, some argue these situations simply reflect deep-seated racism and that this kind of behavior has to be prohibited or punished, and others maintain that we are trying to be politically correct and we are trampling upon the rights of nonminority Americans. Now, I would like to know what your position would be on each of those situations involving Leonard Jeffries, the University of Pennsylvania, and the State of New York. Could you give me some indication of how you, being in charge of the Civil Division, would approach each of these problems?

Mr. HUBBELL. Senator, first of all, I have worked along with a lot of people in my community to break down barriers, but we have not done enough and we must continue to work toward those efforts. You mentioned specific instances that I am not that familiar with, frankly, at this time.

Senator COHEN. Let us call them hypotheticals.

Mr. HUBBELL. But I can assure you that if confirmed by the Senate, we will do everything possible to enforce the civil rights laws of this country, and work very hard to vigorously do that. I can't address hypotheticals. I can only address specific circumstances.

Senator COHEN. But I gave you some specifics and you said they are too specific, and then I said make them hypothetical and you said you can't address hypotheticals.

Mr. HUBBELL. Senator, maybe you can help me. Your question was a little bit long and I had a hard time maybe following it.

Senator COHEN. OK. I guess my time is about up and I see the Chairman looking at me.

The CHAIRMAN. No, I was not. I was responding to the Senator from Iowa. I apologize, Senator.

Senator COHEN. Is he still trying to get his time back?

The CHAIRMAN. No; he is being very accommodating, as usual.

Senator COHEN. I mentioned the situation in the City University of New York with Leonard Jeffries, who was charged with making racially-charged speeches, and he claims now his right to free speech has been intruded upon or violated. Do you have any personal opinion in terms of that controversy?

Mr. HUBBELL. Senator, I don't have any personal opinion. What we would do, if brought to the attention of the civil rights department, is look at and make sure that the civil rights laws of our country have been violated and then we would enforce them.

Senator COHEN. My time is expired, Mr. Hubbell. I want to say that there is a feeling—at least I share this feeling—that those who are white drink from one fountain of justice in the front of the courtroom and those who are black or other minority descent drink from another fountain of justice at the rear of the courtroom. I think that we have to do everything we can to break that down and stop it.

Mr. HUBBELL. I agree.

Senator COHEN. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

Senator Metzenbaum?

#### OPENING STATEMENT OF SENATOR METZENBAUM

Senator METZENBAUM. Thank you, Mr. Chairman. Mr. Hubbell, I should say to you that I think you are a superb nomination, and

I thought so from the inception. But when I learned about the club matter, I became very disturbed—I guess “concerned” was the word, not “disturbed.” You and I met. You wrote me a letter and upon reading the letter, I asked you to support it with some evidence rather than just accepting your word for it, and I think that was understandable.

This is an issue that is not new to me. This is an issue that concerned me when I was in the private sector. I forced two golf clubs to be opened to the public, I forced one tennis club to be opened to the public, going to court on the first two and prevailing upon a Republican governor to bring about that result in connection with a skating club.

So when this matter came to the Senate, it has continued to concern me, and this committee over a period of time has evolved and developed a policy which I think is excellent, and that is that if you are a member of a discriminatory club, you cannot be confirmed. But we were concerned also about the fact that people were resigning just prior to coming up for confirmation or when they knew that they were going to be nominated by the President. So this committee's position evolved to the point where you had to take affirmative action, you had to do something about it if you were in the club in order to try to change the policies of the club.

As a matter of fact, when one man was up for confirmation, a man by the name of Ferdinand Fernandez, he had tried on four or five separate occasions in open meetings to change the club's policy with respect to women and he had failed, but he continued trying. When he became a State court judge, he resigned and said he didn't think it was appropriate to be a member of such a club as a jurist.

But when he was up for confirmation I stated to him, and I quote my words, “Had you opted not to resign, I would not oppose you. If a member of a club makes every effort possible to change the club's policies, then it perhaps serves the purposes of non discrimination to keep that individual in the club, not to force him or her to resign, in order to bring about a change in the club's policies.” I believed that then, I believe it now. I am frank to admit to you that I wish you had opted to remain in the club because I think you were indeed a force for change and I think your efforts have been productive.

Now, after I had asked you about the evidence concerning what you had done to support your letter, it is almost unbelievable to me how much time I have spent since that time reading letters, studying the record about the letter you wrote to the board members, about urging board members to accept Reed's application, about urging the club manager to get African-Americans into the club, about urging Dr. Thomas from 1970 to 1980, and a number of other things Senator Kennedy has already alluded to, one after the other indicating your support for changing the rules of the clubs—not changing the rules—for bringing about change in the club, bringing African-Americans into it. As a matter of fact, I think and would have hoped, and told you personally that I would hope you not resign from the club.

The national president of the NAACP was in my office yesterday about 5:00 and I shared with him my view as to what your action



should be, and he also indicated that he would have thought it would be better for you to stay in the club and to bring in more African-American members. You decided not to do so and I respect you for that, but I have seen no nominee for the judiciary or for the executive branch in Government who has come before us who has taken more action, who has provided us with more evidence than have you with respect to your efforts.

I remember when we confirmed Justice Kennedy, who had made some efforts not nearly to the extent you have made with respect to the matter of women being in the club to which he belonged and finally resigning when he couldn't prevail upon the club to change its rules. But his efforts were nothing compared to yours.

Now, my friend from Maine talks about the fact that we have had different rules and different policies for Republicans and Democrats. I want to point out to you that this committee recommended and sent to the floor of the Senate for confirmation, and he was confirmed, Morris Arnold, who was a member of this very same club. There has been a member who has been confirmed from this club. We did send Anthony Kennedy, as I mentioned, and we did approve Ferdinand Fernandez.

But I would say to you that I think that you were doing the Lord's work in the club. I am sorry that you have seen fit to resign. I think it would have been preferable if you had not, but that was a personal decision which you certainly had a right to make for yourself.

Now, having said that, let me go over to some substantive issues, Mr. Hubbell. Under the Department of Justice's new reorganization plan, you will be coordinating the activities of the Antitrust Division which enforces our Nation's fair competition laws. I expect a number of industries will ask you and the new antitrust chief to relax the antitrust laws for them. They will claim that weaker antitrust laws will make the United States more competitive internationally and will make it easier for the military and the health care industry to downsize. I am frank to tell you I believe they are flat wrong.

I am particularly concerned about the antitrust concessions that hospitals and doctors' groups have asked for under health care reform. Specifically, they would like to exempt mergers, market allocations, joint ventures, and group negotiations from full scrutiny under our fair competition laws. I am skeptical, very skeptical, about the concessions that these groups are seeking. I don't believe patients would be better off if we relaxed the antitrust laws to permit hospitals and doctors to make important health care decisions based solely on their own best financial interest.

We can work out arrangements when two hospitals want to merge and when it is in the community's interest. That is not a problem. We can provide a faster means of handling it. We can provide letters to be made available in the event two hospitals want to merge. But in the main, this thrust toward antitrust exemption for the doctors and the hospitals, in my opinion, is not in the interests of this country.

Can you tell me, if you have a position, what your position would be on granting special antitrust exemption to hospitals and doctors under health care reform?

Mr. HUBBELL. Senator, in the area of antitrust law exemptions should not be favored, and yet I know that there will be a healthy debate among this committee and others regarding issues of health care and whether they should be granted. Exemptions shouldn't be normally granted, but I know that there are going to be people who advocate those, and I look forward to working with this committee and the Health Care Task Force and many others as we debate this issue.

Senator METZENBAUM. Thank you. The drug industry's trade association, PMA, has asked the Justice Department for special antitrust immunity for an agreement among its members to limit price increases. The proposal may sound good on its face, but I believe that it is a sham and will not reduce drug prices for most Americans. That is why Senator Pryor and I asked the Attorney General to reject the PMA's request for antitrust immunity.

Specifically, the PMA proposes to reduce prices under a formula that would allow drugmakers to offset deep discounts to large buyers with price increases to individual consumers. It would also allow drugmakers to offset price reductions on drugs for which they have competition with price increases on drugs for which they have a monopoly. I understand that since the PMA made its request, several drug companies have come forward with other proposals for holding down price increases. However, to my knowledge, none of those companies has asked for special antitrust protection.

What does the Department intend to do about the PMA's request for special antitrust protection for its pricing proposals?

Mr. HUBBELL. Senator, as you know, that is a pending request before the Antitrust Division. As I have said before, as an overall policy matter, the antitrust laws must be enforced and exemptions are not favored. But I would prefer to wait until we have the recommendation of the Antitrust Division before I talk about the specifics.

Senator METZENBAUM [presiding]. I can understand that. Last year, I chaired a Judiciary Committee hearing that revealed a number of examples of how professionals drain the financial life out of a bankrupt company by charging exorbitant and often unnecessary fees. Attorneys get as much as \$500 per hour for their services. Investment bankers get enormous monthly retainers up in the hundreds of thousands of dollars, plus a percentage of the price of the assets sold. Consultants get hundreds of dollars an hour for their services, which include packing and unpacking boxes. Some lawyers have charged for just preparing the bills, charging as much as over \$100,000 just for preparing the bills.

When professionals take so much, there is little or nothing left for those our bankruptcy system is supposed to protect—the creditors, the shareholders, the pension plans, the employees, and others. As a matter of fact, this is an area that has a sort of a built-in absurdity. The lawyer for the trustee today or the lawyers for the creditors today may be the lawyer for the bankrupt tomorrow in another case, and so we find the members of this bar washing each other's hands and saying, that is OK, never objecting.

The creditors really get the short end of the stick. The bankrupt gets the short end of the stick, and too often the American public

suffers directly and indirectly as a result of this game-playing that goes on in the bankruptcy courts.

Will you work with this committee to assure that the U.S. Trustee's Office does a better job of helping bankruptcy courts police professional fees, and would you be willing to look into this entire area to see what else we can do besides just the policing of the professional fees?

Mr. HUBBELL. Yes, Senator, I will. We will look into it. I am fully aware that it is not just in the area of bankruptcy, but that the costs of litigation in our society right now have gotten out of hand.

Senator METZENBAUM. It certainly has. It is unbelievable that any ordinary person who wants to go to court and has a case that is justiciable and in many instances just, at least in that individual's opinion, just can't afford the cost of legal services.

You have been a trial lawyer for 20 years. You said in your opening statement that you have told clients they could not afford to go to trial. I guess this question follows the previous one. What can we do to make our legal system more available to the ordinary individual so that all those who have a just claim can make that claim without bankrupting themselves in connection with paying legal fees? Do you have any thoughts as to what we can do about the entire matter of legal fees?

Mr. HUBBELL. Senator, I have been thinking about it. It is an area that I am most familiar. I think we have to work with all elements of people who use and are part of the legal system in an overall effort to look at our civil justice system. Certainly, areas that have been explored and discussed include alternative dispute resolution, include limits on discovery. It is something that we as a society have to come together and make our justice system available to all of our citizens. I don't believe it is just the poor today who can't afford it; it is almost everyone.

Senator METZENBAUM. Yesterday, I spoke to the district court judges of the United States and I pointed out to them my concern about the new direction that Justice Scalia would like to take our court system, and that is for the courts only to look at the language of the law and not to look at the intent of Congress—what happened on the floor; what the committee reports are; what amendments, if any, were made and the reasons for those amendments.

Do you have any opinion with respect to the propriety of the courts limiting themselves just to looking at the language of the law, or do you believe, as Justice Frankfurter and others have said, that the courts ought to look at the specific language of the legislation, but also look at the legislative background that brought about the enactment of the law and what committee reports and what Congresspersons and Senators said in connection with its passage?

Mr. HUBBELL. Senator, obviously, I wasn't privy to Justice Scalia's comments and don't know in what context they were taken.

Senator METZENBAUM. It was stated in an opinion.

Mr. HUBBELL. Certainly, legislative history in my State when I was on the court was part of the consideration when we were interpreting legislation. I would have to look at the specifics of the circumstance, but certainly in my day and on the court that I served legislative history was considered.



Senator METZENBAUM. Thank you very much. My time has expired.

Senator Thurmond—let us see; I am not sure who is next.

Senator THURMOND. I believe Senator Simpson was next.

Senator METZENBAUM. Senator Simpson? I am sorry.

#### OPENING STATEMENT OF SENATOR SIMPSON

Senator SIMPSON. Mr. Chairman, I appreciate it, and I certainly appreciate that from Senator Thurmond. Perhaps we will reach a stability on the issue of early-bird versus the other, but I do thank Senator Thurmond and the Chair.

Mr. Hubbell, good to see you, sir.

Mr. HUBBELL. Good to see you.

Senator SIMPSON I enjoyed my meeting with you—

Mr. HUBBELL. Same here.

Senator SIMPSON [continuing]. Talking about old days playing college football and how we both got our faces rearranged in that process. My nose suffers greatly from that, and those were interesting times.

You certainly come highly recommended. You are well qualified, very respected, and the way you have answered the questions with regard to the private club issue—and if that is the way that plays out, I certainly will support you in this role. But I must say I have had a genuine kick out of all of this because I was here when Judge Ryskamp came before this group. He was a man from Florida who was in a private club and the abuse that he took here in this committee was absolutely disgusting.

The odd thing was he received extraordinary support from black and Hispanic leaders in his hometown. They sent us letters. I hope the American public and perhaps the media might go back and look at the hearings on Kenneth Ryskamp where the letters were presented. At page 235, there were letters from black lawyers in his area. There were letters from other minorities of all types and descriptions—gender, sex. They sent along their own letters.

There was a most moving letter from one of the remarkable church groups, Rev. Manuel Salabria, where all of his congregation signed a most beautiful, poignant letter, many of them, of course, Hispanic, saying that this man was a wonderful citizen, a remarkable citizen, nothing racist about him. It appeared in Spanish newspapers, it appeared in black newspapers. But Kenneth Ryskamp was ripped out of here in the most remarkable diatribe you can imagine. There have been others in this committee, but that was a pretty good one.

So, you see, at times here we deal—I want you to know we deal with other sinister things here. We dealt once with the Masonic Order. What do you think of that? We were told once several years ago by staff that the Masonic Order was some sneaky bunch. There are about 18 of us, Democrat and Republican alike, who happen to be members of that in the Senate, a fifth of us. The Elks Lodge then one time was put before us as some remarkable bastion of insensitivity. There are only about 2 million members there. I don't know whether they get to the VFW next, or who.

But I can tell you it is disgusting when a club restricts or discriminates, but it is not disgusting when a person has joined the

club to be with their friends. I guess the ultimate hypocrisy, and it was honestly done, was when my fine friend, Lloyd Bentsen, determined that as he ran for President of the United States he would resign his membership in certain clubs in Houston, which he did, which is the way he is as a remarkable person. When that activity was finished, he rejoined the clubs not because he is racist in any sense. There is not a racist shred in the man. He did it because he liked to be with his friends and business associates of his life in that community. So we put a very sinister twist to it.

You obviously did everything you could to remedy the situation. You told me that in my presence and I believe you, and I think that is all that should be asked of you as to try to assist the club to meet its moral and social and civil rights obligations. But to hear some of the discussion today, there are more contortionists in here than there are in the Moscow Circus, and it has really been fascinating. But we will leave it at that; no need to probe it any further. Obviously, there were some errors made in the written record in the past, but what a remarkable exercise.

Just as important, I see that the new organization chart shows that the INS, the Immigration and Naturalization Service, and the Executive Office for Immigration Review will be under your stewardship.

Mr. HUBBELL. That is correct, Senator.

Senator SIMPSON. Well, that pleases me greatly, and we have talked about this. The Immigration Service-Justice Department relationship has not been a very productive one; it hasn't been strong. If confirmed, you will be the caretaker of the relationship that has deteriorated to an unfortunate level.

Now, since you would have day-to-day responsibility for the Agency, I am interested in how you see your role regarding the Immigration and Naturalization Service. How do you view that Agency in these times, because what is happening is the people of America are devoting more of their attention to exactly what is going on when they see what happens with regard to the issue of JFK Airport, the fact that these people just go into our society, the abuse of asylum, the contortion indeed as to someone being a refugee who is not a refugee and yet uses a precious refugee number? What do you see as to what you intend to do with the Immigration and Naturalization Service?

Mr. HUBBELL. Senator, when I came to the Justice Department on January 21, it was probably not on the first of my list as thinking that was one of my top priorities. It has taken as much time of any area that has been in the Department since I have been there. It is an area that needs immediate attention, forceful attention, in so many ways.

We must find ways to deal with the refugee situation, and we must find ways to have people who come into this country illegally to have the process sped up. We must find ways to protect our borders. These are some of the few areas that I can think of at the top of my head without getting into real specifics. But you can be assured that I will work with this committee, Congress, and the administration in giving INS our top priority within the Justice Department.

Senator SIMPSON. Well, I can assure you that that is heartening and, as you indicated to me, you would visit with me from time to time on that issue.

Mr. HUBBELL. I look forward to it, Senator.

Senator SIMPSON. I do, too. There have been many expressed delays in appeals that create these terrible backlogs, and I think the American people will determine as we go through the hearings anew that what we find is often people who are using or misusing asylum or who are illegal often have more due process than an American citizen does because we as a country have built that in out of our own heritage. So, that is something.

You indicated that you would hope to reduce those backlogs and delays. That is correct, is it not?

Mr. HUBBELL. That is correct, Senator.

Senator SIMPSON. On the issue of political asylum, we are going to have a hearing here. You are aware of the fact that people come here. They get on an aircraft with documents and when they land they don't have documents. Sometimes, they actually ingest the documents or dispose of them and then say, I am here. They don't have to say anything, just say "asylum." Then we say we have no detention facilities; your hearing will be in 6 months. They stack their Louis Vitton luggage on a cart and go out and get a cab, and that is the end of that. We don't see them again. Fifty percent of them never show up.

So I hope the administration, as soon as possible, will get a position on that. I think from talking with you and the Attorney General that you are ready to form a position on that because it is so absurd that you can't really get to anything but having some kind of an expedited procedure where if they don't have the correct documents and they are not an asylee, you put them on the plane, the next one out, after a hearing before special officers. That is an expedited inspection, if you will. It is not throwing people out, but I hope that you will be ready for that.

Can we assure that as we have this hearing, which has been scheduled again—it was canceled, as Senator Kennedy said. He was good to schedule it for me at my request. He has worked closely with me on immigration issues and illegal and legal immigration, as has Senator Simon. The three of us are the only members of the subcommittee. No one else wanted to get on, just three of us.

So will you be ready? We have postponed it once. Can you assure us that you will be ready to present us with a position for this hearing with regard to this issue of asylee misuse?

Mr. HUBBELL. Senator, as I believe I told you when we visited, we are working on that right now and I will be ready, assuming it is not today.

Senator SIMPSON. It is not today, but it is coming very shortly. Well, I want to ask a final question. Several of us—Senator Kennedy; Senator Mathias, who is not a member of the Senate any longer; Senator DeConcini—were members of the Select Commission on Immigration and Refugee Policy. We determined that employer sanctions were the most humane tool to address illegal immigration and, of course, then that became a portion of the legisla-



tion. It means simply that an employer who knowingly hires an illegal undocumented person is going to be penalized.

Now, of course, there are problems with it because we never were able to do some kind of universal identifier. It is a cottage industry in fraudulent documents. We don't hold the employer responsible for that, so obviously the employer just looks briefly at the card. If it is a fake, he has done all he is asked to do; that is that. Of course, things happen and don't happen. There has been alleged discrimination.

But it is odd to me that the same groups that called for the repeal of employer sanctions ever since they became law in 1986, and the same congressional Members that called for repeal of employer sanctions are the same people who opposed the legislation tooth and fang during the years it was debated in Congress. So it is likely that those groups believe now they have new friends of the administration, except for Lane Kirkland. You will find that he feels just exactly like I do on this issue.

I would be interested in your position on employer sanctions. Do you believe they are a necessary and important part of immigration control, and will this administration support employer sanctions?

Mr. HUBBELL. Senator, I don't personally have an opinion at this time, but I know that I will have to very soon. I look forward to working with you and others in the area. I do know that this administration, not just this Justice Department, has to do a better job in the area of educating people about what the law is. There is a law on the books and we must do a better job of educating those people about what the law is.

Senator SIMPSON. Well, I thank you, Mr. Hubbell, and you may have listened to the remarks of one of our new members yesterday, Senator Dianne Feinstein, mentioning the public dismay about current large-scale illegal immigration into the United States, the highest level of all time. The mail that rolls in that comes from California—it comes from American-Hispanic citizens who are tired of seeing undocumented illegal people using the system, abusing the system. It strikes across all norms and ethnic groups.

I share her view that there will be a tremendous backlash against legal immigration if we don't get things corrected. With illegal immigration, the only way to do that now is employer sanctions plus some kind of universal identifier. So I will be looking forward to talking with you and visiting with you about that, and it is good to know that you are going to turn high-level attention to resources for the INS, and you have assured me of that.

Mr. HUBBELL. I have.

Senator SIMPSON. Thank you, sir.

Mr. HUBBELL. Thank you.

Senator SIMPSON. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you. Now, Senator Leahy was kind enough to indicate, I think, that he would be willing to yield until we established this rule. The more I do this, the more I am inclined—the longer I am here, the more I like seniority. The seniority rules makes it a lot easier on the Chair, but I yield to Senator Leahy, who I am told will—

Senator LEAHY. Mr. Chairman, as earlier when Senator Kennedy asked if I would be willing to yield time to him, I will be glad to

do that now, for Carol Moseley-Braun. I will, of course, yield to her, but I just want to know two things for the record. If I don't get a chance to come back, I will submit my other questions for the record.

But I certainly would not compare this with the Judge Ryskamp nomination at all. He was in a club which had a reputation for excluding members on the basis of race. The Coral Gables Commission wouldn't meet there because of that. Governor Martinez, who certainly was not known as any flaming liberal, held up a judicial nominee because of his membership in that club. Meanwhile Ryskamp was sitting there as a Federal judge with membership in that following times when there had been newspaper articles and everything else about their exclusionary policies. In fact, a Jewish newspaper publisher was turned down solely because of his religion.

That is a lot different than the Little Rock club which has functions attended by blacks. They use all of the sports facilities. Now, following Mr. Hubbell's efforts, it has a black member; there are Jewish members. It is, I believe, a completely different situation. I understand the parallels that are being drawn, but I would suggest that the record shouldn't allow those parallels to be drawn so completely that nobody even raises the point that there is something different.

Senator SIMPSON. Mr. Chairman, would you yield for 10 seconds?

The CHAIRMAN. Sure.

Senator SIMPSON. Let the record clearly show that Judge Ryskamp was in the club and trying to change that. That was clear in the record.

Senator LEAHY. Well, it is fairly unclear in the record. This was a man who came up here and, as one of the editorials—I believe the Washington Post—underscored his insensitivity toward the racial, ethnic, and religious policies of that club. He was even able to blow a courtesy call. Judge Ryskamp was sort of brought kicking and screaming into even acknowledging that there might be a problem there.

But, anyway, we have gone longer than I intended. I do want to yield to the Senator from Illinois.

The CHAIRMAN. Thank you. I am prepared to accept the generosity of our Republican colleagues on this issue.

Senator SIMPSON. Yes, all right.

The CHAIRMAN. And I would point out that unrelated to the clubs, as my colleagues will remember, with Judge Ryskamp, rightly or wrongly, good or bad, founded or unfounded, there were allegations of racial slurs from the bench and insensitive remarks which became a big issue. I don't want to relitigate that. I just want to make a point that there were additional issues relating to that as well. But as I said, I am delighted to leave it as acknowledging, and I mean this sincerely, the generosity of the ranking member and the distinguished Senator from Wyoming and the Senator from Maine and others, and we can move on. And you should be hoping we do, too, Mr. Hubbell.

Senator SIMPSON. Mr. Chairman, he had one other significant defect. He was a conservative.

The CHAIRMAN. I am also prepared to let the Senator have the last word.

Senator SIMPSON. No, no. Give it to Senator Leahy.

The CHAIRMAN. No, no.

Senator LEAHY. I am the token exception to the rule here on seniority, so I will just sit back.

The CHAIRMAN. Yes, and I thank you for your generosity, Senator.

Senator Moseley-Braun.

#### OPENING STATEMENT OF SENATOR MOSELEY-BRAUN

Senator MOSELEY-BRAUN. Thank you, Mr. Chairman. When you are number 93 out of 100 in seniority, you especially appreciate the generosity of Senator Leahy for allowing you to go forward. Thank you very much, Senator Leahy.

The CHAIRMAN. For 2 years, I was number 100 in seniority and for 6 years I was below 90.

Senator MOSELEY-BRAUN. That was in 1949, right, Senator? [Laughter.]

The CHAIRMAN. That is exactly right.

Senator MOSELEY-BRAUN. Yes, thank you.

The CHAIRMAN. That was the bad old days. The press liked that. I didn't know I was getting that old, but I guess they are right. I am. You are right, Senator.

Senator MOSELEY-BRAUN. Sorry about that, Mr. Chairman.

The CHAIRMAN. That is OK.

Senator MOSELEY-BRAUN. I didn't mean a word of it, except the thanks to Senator Leahy.

The CHAIRMAN. No, no. It is an accurate observation.

Senator MOSELEY-BRAUN. In carrying out my duty under the Constitution to advise and consent to Presidential nominations, I believe it is necessary to carefully evaluate two aspects of a nominee's background—his or her competence and his or her character. There has never been any doubt concerning Mr. Hubbell's competence to serve as Associate Attorney General. He has distinguished himself in both the private and public sectors, serving as managing partner of one of Arkansas' leading law firms, as the mayor of Little Rock, and as a justice on the Arkansas Supreme Court.

Based on his experience both as a litigator in complex civil trials and as a judge and as pro bono counsel to people who needed his help, Mr. Hubbell has demonstrated himself as a man of great competence in the law, and I think we are fortunate to have him offer his talents to help Janet Reno restore luster to the faded Justice Department.

Mr. Hubbell's character, however, became an issue for many Americans both in and out of the Senate when news of his membership in an exclusive country club made headlines. For this Senator, the issue of membership in exclusive private clubs has always been much larger than any one individual. Membership in such clubs is not so much a matter of morality as it is a matter of economics.

Women and minorities do not seek to join establishments such as this country club or any other because they are desperate for cama-



raderie, friendship, or ambience to be found in those venues. Their motivation is the same as that of the men who have belonged to those country clubs for years. It is on the golf course and in the clubhouse where deals are made and networks are nurtured.

It is not a matter, Senator, of hanging out with your friends and associates. It is very often a matter of business.

Exclusive establishments such as this country club represent the highest reaches of the glass ceiling, and I believe we must use every tool within our reach to shatter that ceiling once and for all. I am aware, Mr. Chairman, that this committee has struggled over several years to develop a tenable policy on club membership. For those who believe bona fide efforts to integrate such clubs are the best course, Mr. Hubbell's well-documented efforts represent a textbook example of such a campaign. For those who believe that maintaining membership in such establishments is incompatible with holding a position of high public trust, Mr. Hubbell is no longer a member of the club in question, and so that issue becomes moot.

Mr. Chairman, we may need to reexamine our position on exclusive clubs, but for today let the record be clear. Webb Hubbell has not only played by this committee's rules, he has gone one step further. His resignation is no admission of guilt. It is a demonstration of his sensitivity, and I would like also to congratulate and thank the members of this committee for the sensitivity they have demonstrated to this issue because, quite frankly, as opposed to contortions or a stage joke, the fact of institutional, systematic discrimination is a very serious matter, striking to the heart of our efforts to open up this society to women and minorities as equal partners.

The fact that this committee has grappled as intensely, and that Mr. Hubbell has grappled as intensively as he has with this issue, I think speaks very highly for the members of this institution and of this committee.

Club membership illustrates one facet of a nominee's character. With a nominee like Webb Hubbell, however, there are other aspects of his life which provide us with much more insight about the true nature of the man. This is particularly true with respect to the issue which has come into question, his commitment to civil rights and equal opportunity.

I have listened, Mr. Chairman, to people who know Mr. Hubbell and have worked with him over the years, particularly from Little Rock's African-American community. My friend, Lottie Shackelford, is here and Lottie went out and did the full-court press on your behalf, Mr. Hubbell. I have listened to members of the African-American community in Little Rock and what they have said about Webb Hubbell is that from the very beginning he has gone out of his way to try to open up this society. They have told us quite simply that he has lived his life as a shining example of the best of the South, and they are proud to send him to Washington and I think we should be proud to have him here.

Mr. Hubbell, I want to welcome you, and this is my chance to ask you some questions about this Department. Again, I want to congratulate you on your nomination and to say to you that I am more than well pleased and satisfied that you have demonstrated the sensitivity to this issue that I think our country needs to have in a high level such as your leadership as Associate Attorney Gen-

eral for the Justice Department, and I thank you for what you have done. I congratulate you for it, and I congratulate you again and I congratulate the members of this committee for taking this issue as seriously as it is.

It is a very serious matter. It is a matter of economic opportunity and inclusion for women and minorities, and one that, given this level of discourse, I believe will leave our country richer and better for it. Again, I want to thank you for that.

I have some specific questions on an issue having to do with the part of the Justice Department that you will undertake. Now, you are going in as Associate Attorney General, which means you will have the Office of Legislative Affairs, the Office of Legal Counsel, Immigration and Naturalization, the Executive Office for Immigration Review, the U.S. Trustees, Information and Privacy, Foreign Claims Settlement, Civil Rights Division, Civil Division, Antitrust Division, Environment and Natural Resources, the Tax Division, and the Community Relations Division. Is that correct?

Mr. HUBBELL. That is correct, Senator.

Senator MOSELEY-BRAUN. There is a hold-over matter, Mr. Hubbell, that probably marks one of the more sordid chapters in the history of the Justice Department, and it goes back, frankly, to 1983 under the tenure of two previous attorneys general in which the Department of Justice may well have been involved in a situation of which mystery novels are written. The Inslaw case is what I am referring to.

In that case, there have now been hearings by the House committee. There have been hearings by this Department, and I want to ask you a couple of questions about Inslaw because if indeed the indications are correct, then this really is a scandal of monumental proportions that will tarnish the Justice Department's integrity and reputation not just in this country, but all over the world.

Let me ask, are you familiar with the Inslaw case to begin with?

Mr. HUBBELL. Senator, I am not as familiar as I know I will be. I know that Judge Bua has issued his report. It is currently being reviewed by people within the Justice Department. It is also being redacted to take out certain grand jury testimony and will be then made available to the attorneys for the other side. I have not reviewed the report at this time.

Senator MOSELEY-BRAUN. You said Judge Bua has finished—Judge Bua is from my circuit, by the way, and when I was in the U.S. attorney's office he was already on the bench and he is a greatly respected gentleman. But his report has been finished?

Mr. HUBBELL. Yes, Senator.

Senator MOSELEY-BRAUN. Has it been released?

Mr. HUBBELL. No, it has not been released.

Senator MOSELEY-BRAUN. Where is it now?

Mr. HUBBELL. It is at the Justice Department.

Senator MOSELEY-BRAUN. Where? On whose desk is his report?

Mr. HUBBELL. Copies of the report are with the Attorney General, with Phil Heymann, with myself, and I believe one other gentleman who is reviewing it.

Senator MOSELEY-BRAUN. You have not had an opportunity yet to review it?

Mr. HUBBELL. No, I haven't, Senator.

Senator MOSELEY-BRAUN. Well, that is actually understandable. A couple of questions. One, is it your intention to move expeditiously on a resolution within Justice of the Inslaw situation?

Mr. HUBBELL. Senator, there are two aspects that I am aware of. One is the Judge Bua report, the other is litigation that is going on right now. I don't think it would be appropriate for me to comment on that litigation, but I can assure you that the report is going to be made available for the attorneys to the other side and then we will deal with it in an expeditious fashion.

Senator MOSELEY-BRAUN. Do you have a timetable for release of the report to this committee?

Mr. HUBBELL. Senator, I don't. I will be happy to consult with Attorney General Reno about its release and its timing. It should be soon.

Senator MOSELEY-BRAUN. In that regard, Mr. Hubbell, in terms of the Inslaw situation, it is my understanding that Justice has been using this software since 1983. It has been used by the Justice Department, by intelligence networks, law enforcement agencies, and even foreign governments. We have never paid the people who developed this stuff a dime, have we?

Mr. HUBBELL. Senator, I am not familiar with the facts of the case at this time. I will be.

Senator MOSELEY-BRAUN. OK. Then I guess my last question is, assuming for a moment that Judge Bua's report discloses wrongdoing by the Justice Department, is it your intention to pursue via criminal as well as—well, I guess you can't speak to the criminal, but is it your intention to pursue by civil means restitution to the victims of this alleged conspiracy?

Mr. HUBBELL. Senator, because there is an ongoing case, I don't think it would be appropriate for me to talk about the specific remedies until after we review the report.

Senator MOSELEY-BRAUN. I was trying to ascertain whether or not you were referring to the private litigation or an initiative by the Justice Department.

Mr. HUBBELL. There is private—there is litigation, as I understand it, that the Justice Department is a party to, Senator, and that is why I am reluctant to talk about the specifics of the case.

Senator MOSELEY-BRAUN. Yes; well, I would ask that you report to our Chairman in this matter as soon as you see your way clear to make the report on Inslaw available to the committee.

Mr. HUBBELL. Yes.

The CHAIRMAN. Thank you. Thank you very much, Senator. I have been discussing for a minute here the schedule with my distinguished—

Senator MOSELEY-BRAUN. I wasn't exactly finished, but it is OK.

The CHAIRMAN. Oh, I am sorry. I beg your pardon.

Senator MOSELEY-BRAUN. It is OK.

The CHAIRMAN. No, keep going, you have more time.

Senator MOSELEY-BRAUN. No, no, no, Mr. Chairman. It is fine. Again, I just wanted to try to pin down—

The CHAIRMAN. Please, go right ahead. You have more time.

Senator MOSELEY-BRAUN [continuing]. A commitment that should wrongdoing be discovered, will you use every means possible



to pursue to the enth degree, no matter how far-flung or how high up it goes, the actors in this alleged conspiracy?

Mr. HUBBELL. Senator, I will consult with Attorney General Reno and Phil Heymann, and I can assure you if there is wrongdoing that we will take appropriate action.

Senator MOSELEY-BRAUN. Thank you very much. Now, I am finished.

The CHAIRMAN. Thank you very much. I was discussing very briefly the schedule for the remainder of the morning and day with Senator Hatch. With the permission of our colleagues and the forbearance of the witness, it seems as though there are probably no more than four more Senators who have questions, and at the suggestion of the Senator from Utah maybe what we should do is give you a 5-minute break now and if you agree, we will just go straight through lunch and you will have a later lunch rather than an earlier lunch. Rather than break now, come back at 2 and come back only for an hour or so, let us—do you have a problem with that?

Mr. HUBBELL. Senator, that would be my preference.

The CHAIRMAN. All right.

Senator GRASSLEY. Under the early-bird rule, who comes after me?

The CHAIRMAN. Well, hopefully, you will be gone and won't know. [Laughter.]

I, honest to goodness, don't know, but I will work that out in this 5-minute break. We will recess for 5 minutes and come back with Senator Grassley.

[Recess.]

The CHAIRMAN. The distinguished Senator from Iowa.

#### OPENING STATEMENT OF SENATOR GRASSLEY

Senator GRASSLEY. Thank you, Mr. Chairman, and thank you, Mr. Hubbell, for your work as a public servant and a community leader, and congratulations on your appointment. Let me say I enjoyed very much getting better acquainted with you in my office and visiting with you.

I think in a city like this, any President of the United States probably deserves a friend like you close by, and I would not find fault with the President in his desires to have somebody like you in whom he has confidence not only because of friendship, but because of your attributes as a counselor in a position where you are going to be.

On the question of club membership, let me make very clear that I think most of the very specific questions that I was going to ask you have been very competently covered by some of my colleagues, but if I could, I would like to bring this up partly to make points and partly to ask some questions that have not been asked.

If I could review just some facts, you have been a member of the Country Club of Little Rock since the late 1970's, although you have been a full member since 1985. The club did not have any African-American members until December 1992, a month after President Clinton's election, and I remember your explanation that there had actually been a processing of this for many months prior to that period of time.

Now, the situation we are in here, to kind of put it into context, if I could, is reminiscent of Vaughn Walker's nomination for Federal judge when one of my colleagues on the other side of the aisle said, "Vaughn Walker had not taken significant action to change the club's policy until his club membership endangered his confirmation prospects." That Senator on the other side of the aisle concluded that Mr. Walker's efforts to change the Olympic Club's policy against admitting women were "nothing more than a cynical effort to get himself confirmed."

Vaughn Walker was confirmed, and I expect that you will be as well. I haven't seen anything yet published or said today that would indicate anything other than that you will be confirmed. But I think that by now you have some appreciation of the seriousness of this issue before you and, of course, you have indicated that as well in your resignation effective today from the club.

One question that maybe has not been asked about your club is how many women members it has and for how long it has admitted women to full membership.

Mr. HUBBELL. Senator, since I have been a member, we have had women members, and I know as far back as I know about the Little Rock Country Club they have had women members.

Senator GRASSLEY. OK. Some of my Democrat colleagues have said that they did not see a need for you to resign from the club. So let me ask, then, why did you resign from the club?

Mr. HUBBELL. Senator, it is a very personal decision on my part in believing that, as I said in my opening statement, that I don't want—I know that this issue has been perceived by some that I am not sensitive, and as I go forward and, hopefully, if confirmed by this Senate, in a very, very difficult job, I don't want anyone to have that perception, so I resigned.

Senator GRASSLEY. Let me ask you a question, understanding that this was several years ago when you were younger. Can you tell me why you joined the club in the first place, a club that at that time didn't have any minority members?

Mr. HUBBELL. Senator, I wanted to play golf and it was close to my home and a very good golf course.

Senator GRASSLEY. Well, how can I find any fault with that answer?

The CHAIRMAN. What is your handicap?

Mr. HUBBELL. Honestly, Senator, it is on the board as a 10, but I haven't played to it in years.

Senator GRASSLEY. I would just simply ask you at that point of your initial application—and I don't say this with any unfairness if this is the way you thought, that maybe at that point in your life it didn't really matter and it wasn't an issue foremost in your mind whether or not the club had any minority members.

Mr. HUBBELL. No, Senator. I have tried all my life to be sensitive to those types of issues. African-Americans were using the club at that time. I quickly found out there weren't any members and began to talk to people at that very point. I tried to be sensitive to these issues since I have gone to college. I grew up in the South where discrimination for a long time was more than just subtle, it was direct.

Senator GRASSLEY. Let me ask you if, during this thought process that led you eventually, in your words, to promote speaking out and getting minority members—did you ever consider undertaking any affirmative action or changing club policies to accommodate members, like maybe perhaps a lower dues fee, if there were any economic impediments to minority members coming into the club?

Mr. HUBBELL. Senator, I never was on the governing body, but certainly that would be an area of discussion. Another area of discussion is whether certain financial institutions could make a loan. Those are the type things that you consider and talk about, but I was never on the governing body which would have discussed lowering dues or something to that extent.

Senator GRASSLEY. Now, did your answer say that you did try to get the governing body to think in those terms, or if you had been on the governing body those are things that you would have suggested?

Mr. HUBBELL. Senator, I didn't mean to imply that I suggested that to the board because I did not.

Senator GRASSLEY. OK.

Mr. HUBBELL. If I had been on the board, I might have been able, through the board, to look at other ways that we could have promoted affirmative action, but I was not.

Senator GRASSLEY. Do you have a rough idea how many members of the club there are today, all members, just roughly?

Mr. HUBBELL. Senator, I believe the membership is somewhere between 400 to 500.

Senator GRASSLEY. OK. Now, to what extent do you believe that one black member out of this many members that you have just stated makes the club integrated?

Mr. HUBBELL. Senator, I would not be satisfied if I felt—and I never would have felt that only one black or African-American member would be satisfactory in that type of context. Certainly, I hope and know that other members of the club are working right now to recruit other African-American applicants to the club.

Senator GRASSLEY. A spokesman for the President make the point that the issue of club membership should be closed because with the one member the club is now integrated. I would like to take this point one step further. Is it fair to say that a neutral policy—in this case, the initiation fee and club dues—may have a disparate impact upon minorities?

Mr. HUBBELL. Senator, I wouldn't want to say what the initiation fee is. There are—certainly, other African-Americans in our community could afford to join the club.

Senator GRASSLEY. Well, if that did have a negative impact upon membership, I guess we won't call it discrimination in this case even if it has a disparate impact, right?

Mr. HUBBELL. Senator, I am having a hard time understanding the question. I apologize. I know it is my fault.

Senator GRASSLEY. No; you don't need to apologize. I think I am going to go on to another question.

Mr. HUBBELL. OK.

Senator GRASSLEY. I discussed with Janet Reno the case of the Harold Ford jury selection decision and where that should be held, and I brought your name into that exchange with her. First of all,



I'm not concerned with the substance of the Harold Ford case, but I am concerned with the case as a specific example of possible interference by DOJ and the White House. Let me say, when I served in the House of Representatives, I considered Harold Ford a friend. He treated me well. Hopefully, I treated him well, and the same thing today.

But I have been concerned because previous administrations have been kind of chastised for so-called political involvement in the process of handling specific cases. My reason, then, for inquiring into this area has to do with my concern about prosecutorial independence and interference from either Congress or the White House in a particular criminal case or investigation.

You were on the scene at Justice during the time that Congressman Ford and other Congressmen on his behalf appealed to the Department to overturn a decision of a local U.S. attorney. All of this happened over a few days in mid-February, and I have a chronology that you were good enough to prepare for me that I am going to introduce into the record. I know that Senator Biden went over some of this with you, but I would like to review some more details.

Could you tell us about the discussions that you had about this matter? First, I note in the documents that you provided the committee that assistant White House counsel Vince Foster forwarded to Acting Attorney General Gerson a letter from Rev. Jesse Jackson about the Ford case and the jury issue. What contacts did you have with the White House counsel's office or other White House officials about this matter, and could you please tell us about any of the conversations, with whom, when, and what was said?

Mr. HUBBELL. Senator, the only conversation or contact I had with anyone at the White House was on Monday—I don't have the exact date—when I received a call from Bernard Nusbaum to say that Congressman Ford had wanted to talk to the President about his case and that they had referred him to the Department of Justice. That was all that was said.

Senator GRASSLEY. OK; hopefully, I am going to now refer to the very same conversation you just mentioned between you and Stuart Gerson on the subject about whether to join a motion by the defense to strike the jury and select a jury from Memphis and what recommendations you may have made to Mr. Gerson on that point.

Mr. HUBBELL. On Friday, as Stuart was making his decision, he visited with many people, I believe; I was one of them. We discussed the positives and negatives about the decision one way or the other. We talked about what we thought might happen if he decided to join in the motion and what might happen if he decided not to join in the motion. After we had that lengthy discussion, he asked me if I would support his decision either way he went and I said of course. He was the Attorney General at the time. Later that evening he called me and said to come down, that he would like me to review his press release that he was going to issue and his statement.

Senator GRASSLEY. I think you have been very forthcoming on that answer. Let me just say this, then: You discussed it with him, you did not make any recommendation to him. You said he was the

Attorney General and you responded positively that you would support what he decided?

Mr. HUBBELL. That is correct.

Senator GRASSLEY. I hope through this process and the outcome of the Ford case, where the jury acquitted him, that not only for you, but also for Mr. Gerson that confidence would be reestablished in our process of justice in America. And, I hope we can avoid future interference or attempts at interference—those are my words—in the process. After all, Congressman Ford did get a fair trial from the jury selected from outside Memphis. He obviously did or he wouldn't have been acquitted.

Let me ask you a question on the general subject of ethics in government as it relates to your involvement with the writing of an ethics law, or your helping to draft an ethics law for Arkansas. I understand that President Clinton, then Governor Clinton, advocated a comprehensive lobbyist registration and disclosure law. In the initial draft, the proposed law also would have required public officials to file a report every time that they act in a way that would have had some impact upon the family's personal finances. That bill did not pass the legislature, so you went back to the drawing board and revised the bill and submitted it directly to the people in a referendum.

In the revised ethics bill, the requirement of disclosing potential conflicts only extended to State legislators and not to the Governor's office. Why did you make that change?

Mr. HUBBELL. Senator, obviously that process was a long one. I served on the ethics commission appointed by the then Governor who proposed model legislation for the Governor to submit to the legislature, and that proposal included a section which would have required all public servants, not just the Governor, not just the legislature, but public servants all the way down to the Rogers, AR, Tree Board, which was a specific example that came up, to have to make such disclosures.

During the legislative process where we were unable to pass any ethics or lobbying bills, one of the primary opponents to the legislation were those same local officials who were concerned about that provision. So in drafting and being asked to draft an initiated act, those who were with me, including Common Cause, other individuals, tried to craft a legislative act that dealt with what was perceived to be the biggest problem, that being lobbyist disclosure in the State of Arkansas.

We had just gone through a session where the lobbyists had beat any reform and we had no law. So we also had to draft very carefully a public popular name and ballot title, so we had to limit the act to where it could be passed, and it was.

Senator GRASSLEY. My time is up. I guess I would just simply close by asking, couldn't that have been done by just exempting those small-town and local officials who were not paid and who volunteered?

Mr. HUBBELL. Senator, as you know, in drafting legislation there are always lots of options, but when you grant an exemption here or otherwise, it can have effects. We tried to very carefully draft this law so it would deal with the lobbyists, and it did so and has

been, as I understand it, recognized as one of the model lobbying disclosure acts in the country.

Senator GRASSLEY. Mr. Chairman, I will ask the rest of my questions on the next round.

The CHAIRMAN. OK, thank you.

Senator Leahy.

#### OPENING STATEMENT OF SENATOR LEAHY

Senator LEAHY. Thank you, Mr. Chairman. Mr. Hubbell, I have sat here and listened to you now for almost 3 hours and I have been impressed with your answers. From what I have heard here today and what I have heard in my own meetings with you I think—you bring a common-sense attitude toward the law and toward the Department of Justice, something that is needed. I like the idea of having somebody there who has had experience in the private practice of law and somebody who truly understands what is there.

I would note that you have men and women at the Department of Justice, career employees, who are among the finest lawyers I have had the privilege to meet as a member of the bar for close to 30 years now, and I would hope that you would encourage them in their efforts. They are there because of their sense of dedication and their sense of what the Department of Justice should be. Many have been hurt by the demoralization that has taken place there for various reasons over the past number of years, and I think that you would do not only the Department of Justice, but the whole country, well to encourage them to come back to be able to fully utilize their talents, and these talents are formidable.

I should also note in the past few years that Chairman Biden and Senator Thurmond and I, along with most other members of this committee and Chairman Brooks from the House Judiciary Committee, have been working on a bill that would improve American competitiveness by encouraging joint production ventures, something that will eventually create thousands, perhaps tens of thousands, of good, high-paying jobs in this country. The administration has been very helpful to us.

Yesterday, the House passed the consensus bill. I think we are going to have it on the floor very quickly and I look forward to its passage. I just mention that to say thanks for your help with it. We had bipartisan support here and strong help from the administration and we got it passed.

I would like to talk about something that has been an area that I have sort of championed in my years on the Judiciary Committee, and that is the Freedom of Information Act. I think the Justice Department has not shown respect for the Freedom of Information Act during the past 12 years. This is the one Department that should be at the absolute forefront of making FOIA work. Instead, the Department has been like an anchor on it.

Last year, Senator Brown and I introduced legislation to update FOIA. We wanted to cover electronically-stored government information. I very rarely bring paper home anymore; I use my home computer to come back into my files here in my office. So much is on electronics. Will you and the administration work with us to get



this bill passed quickly and more broadly to make sure that open government is a reality?

Mr. HUBBELL. Senator, I am not that familiar with the bill itself at the current time, but I know I will be, and I look forward to working with you on it. I believe very strongly in government in the open.

Senator LEAHY. In 1977, Griffin Bell, then Attorney General, wrote to all Government agencies to work not only with the letter of FOIA, but with the spirit of it. I hope that this would be your attitude and the Department's attitude.

Mr. HUBBELL. Senator, I will be glad to carry that back to Attorney General Reno and see if a similar letter won't go out.

Senator LEAHY. I think that a lot of departments wanted to comply with FOIA and we have tried to build in incentives for them to do that, everything from being able to keep part of the fees if they are within certain times, and so on. But they would like to know that that is really what the administration wants, and I think if the Department of Justice especially, the Department that has to defend suits regarding FOIA—if the clear message comes across that you want more openness in government, not less openness, it is a message that is going to carry the day.

Incidentally, last year the administration created a major controversy by proposing legislation that would require the telecommunications and computer industries to make their products not more user-friendly, but more wiretap-friendly. They wanted to put in a trap door so that if you had a computer, even if it is encrypted—something that we are telling our manufacturers to do—they could get in. As we find now that some of our finest allies, including some that get foreign aid from us, are doing everything possible to steal our commercial secrets, we ask our manufacturers to use encrypted communications. At the same time, we say, however, if you do that, we really want to have a little trap door that we, the FBI, can come in and plug in and find out because we would only have the purest of motives in doing that. I think it is one of the dumbest ideas I have heard. I can't imagine anything—on these encryption services and programs—I can't imagine anything that would hinder network security more than a trap door. And I can just see an American company trying to sell communications gear or computers abroad and have somebody say, "Oh, yes, this is the one where your Government can automatically tap in."

So, please work with us if a similar idea comes up in this administration. I fully understand the needs of law enforcement to be able to utilize electronic investigative methods in criminal cases. But to go on the assumption right at the beginning that every single person can have a computer and that computer can have an electronic trap door in it for the Government, which would never violate their rights, is not one that I can support.

I would hope as we try to merge the needs of law enforcement in this country that we will work very closely and also understand that an awful lot of people have their own private commercial needs and don't have an enormous degree of trust that the Government would always protect their rights.

The INS has had terrible management problems and internal conflicts in recent years. It has been awful, and now they have an

extreme centralization of INS here in Washington. In some ways, it seems the cure might be worse than the disease. How do you feel about INS and reform?

Mr. HUBBELL. Senator, as I have said a couple of times, the INS is on the forefront of our attention, and must be. I have heard more about the INS since coming to Washington than any other department or any other division, and the Attorney General and I are committed to giving that our top attention.

Senator LEAHY. Listening to the things that Senator Simpson was saying on the problems, we need some way of tracking aliens, especially criminal aliens. I have made proposals on that, as others have, and I have sent a letter down to the Attorney General. I will send a similar letter to you.

There are good areas. Without sounding parochial, the INS Eastern Regional Office is generally considered, in all the reviews I have seen outside, as well as internal reviews—as a model of what INS is supposed to do, and I would ask you also to look at that. Many times when they do the good office versus bad office, they use the Eastern Regional Office as the one that is good and use just about everything else as the bad. So, take a look at it.

For the record, Mr. Chairman, I would note that that office is located in Vermont, but you probably were reaching that conclusion on your own.

The CHAIRMAN. I suspected that that may be the case.

Senator LEAHY. But I think so much of INS was set up at a much easier time, a far less complex time, on INS questions and they just have not kept up to date. I would urge you that that be one of the absolute top priorities.

Mr. HUBBELL. Senator, I assure you it is.

Senator LEAHY. Mr. Hubbell, this may sound like a softball question, and please don't take it as such. Why do you want this job? Maybe I should put it this way; on the day you leave this job—and you will be confirmed, there is no question about that—but on the day you leave the job, what do you want to be said about you?

Mr. HUBBELL. Senator, to go back to why I want this job, I have, as I said in my opening statement, been a civil trial lawyer for 20 years, and yet I have had the enjoyment of also being in public service. I have an opportunity, thanks to Attorney General Reno and President Clinton, to merge both my love of the law and public service, and to hopefully help this administration and both sides of the aisle to come to grips with some very, very difficult issues.

I see in the area of civil justice a possibility that many of our citizens feel like that they cannot have a civil remedy, that will cause disaster. And I hope if I could leave here with one legacy in hopefully 4 years, if confirmed by the Senate, it would be that we have come to grips with our civil justice system and made it more accessible to all of our citizens.

Senator LEAHY. Thank you, Mr. Chairman. I will yield back the rest of my time.

The CHAIRMAN. Thank you.

Senator Thurmond.

## OPENING STATEMENT OF SENATOR THURMOND

Senator THURMOND. Thank you, Mr. Chairman. Mr. Hubbell, we are glad to have you with us.

Mr. HUBBELL. Thank you, Senator.

Senator THURMOND. Mr. Hubbell, it is my understanding that you have played a major role within the Department of Justice during the past several months. If you are confirmed as Associate Attorney General, do you expect your role to become more significant or change in other ways?

Mr. HUBBELL. Senator, I hope that my role will change because it will mean that we will have brought in not only a Deputy Attorney General, a Solicitor General, and numerous other assistant attorney generals who can help us go forward with Janet Reno's and this administration's program. I hope that I will be able to more focus in the area of civil justice and not be putting out so many fires, so to speak.

Senator THURMOND. Mr. Hubbell, I understand the Chairman has touched on the issue of your serving as liaison between the White House and the Department of Justice. As a followup, please discuss whether as Associate Attorney General you would primarily view your loyalty to be to the Attorney General or to the President.

Mr. HUBBELL. My first loyalty, Senator, is to the people of the United States.

Senator THURMOND. Of course, but within the administration do you view your loyalty to the President or the Attorney General?

Mr. HUBBELL. I don't see they are in conflict, Senator, at this time, but my boss is Attorney General Reno and she can ask me to leave any time she wants to.

The CHAIRMAN. I think you answered it the wrong way, but go ahead. [Laughter.]

Senator THURMOND. Although earlier we spoke in my office concerning the details of your involvement in the Ford case and you testified today concerning it, I would appreciate hearing whether you would handle a similar situation differently today.

Mr. HUBBELL. Senator, my role was to advise Attorney General Gerson. If it were today, it would be to advise Attorney General Reno. I gave Attorney General Gerson—we discussed the matter. We talked about the possibilities, we talked about what was going to happen. I would hope that I would give the same consultation with the current Attorney General as I did before, recognizing in this case and on such a broad policy matter that it is ultimately the Attorney General's decision.

Senator THURMOND. As you may know, Mr. Hubbell, I am the ranking member of the Subcommittee on Antitrust, Monopolies and Business Rights. I understand that you have some familiarity with antitrust laws. Please give us your views on the antitrust laws and their importance to the competitiveness of U.S. businesses.

Mr. HUBBELL. Senator, I am not an expert in the area of antitrust, but I have tried antitrust cases. My views are that the laws of the country must be enforced and that we must look at the antitrust laws and its enforcement now in the area of global economy.

Senator THURMOND. We are all concerned with the competitiveness of U.S. industry, and Chairman Biden has chaired hearings on this issue. Do you believe that the antitrust laws should apply



equally to U.S. and foreign businesses, or should they seek to favor U.S. companies compared to foreign businesses?

Mr. HUBBELL. Senator, I do not have an opinion on that right now. It is not something I have been asked to address yet, but since you have asked me, I will look into it and be glad to give you what my opinion is.

Senator THURMOND. Mr. Hubbell, as you know, section 5 of the Voting Rights Act requires certain States and localities to obtain preclearance from the Federal Government before they change any voting procedures within their jurisdictions. Do you view this requirement as outdated or do you believe it is necessary to continue to mandate this Federal checkoff of the States and localities under this statute?

Mr. HUBBELL. Senator, I do not have a view one way or the other, but I believe that the preclearance is the law and we would enforce the law as it now stands.

Senator THURMOND. Do you think all States ought to be treated alike?

Mr. HUBBELL. Senator, I don't have a view on that.

Senator THURMOND. What?

Mr. HUBBELL. I don't have a view. I believe in enforcing the civil rights laws of this country.

Senator THURMOND. Well, I will just ask you this question. Do you believe that any law should apply to all the States and not single out certain States; in other words, treat all the people of all the States alike?

Mr. HUBBELL. Senator——

Senator THURMOND. You are not prejudiced against the South, are you? [Laughter.]

Mr. HUBBELL. Senator, I can assure you I am not prejudiced against the South.

Senator THURMOND. Wouldn't it be fair that whatever laws we pass apply to everybody? You could have violations in any part of this country, couldn't you? Therefore, you wouldn't single out any particular section and treat them differently.

Mr. HUBBELL. Senator, if there is a violation of the Voting Rights Act in any section of the country, it should be enforced. The civil rights laws should be enforced.

Senator THURMOND. I agree with that, and those laws should be applied to everybody, shouldn't they, and not just a few?

Mr. HUBBELL. Senator, I don't write the laws. You do, and I will enforce them. I do believe that if there is a violation of the civil rights laws, it should be vigorously enforced.

Senator THURMOND. That is not what I asked you. I asked you if you think the laws ought to apply to everybody in this Nation and not discriminate against any particular section—apply the laws to everybody.

Mr. HUBBELL. Yes, I do believe that.

Senator THURMOND. Isn't that a fair thing to do?

Mr. HUBBELL. Yes, I do, Senator.

Senator THURMOND. Thank you. Mr. Hubbell, as a trial lawyer and former judge, what role do you believe the American Bar Association should play in the selection or recommendation of Federal judges? What role do you believe other State, local, or specialized

bar associations should play in the selection or recommendation of Federal judges?

Mr. HUBBELL. Senator, as I understand it, with regard to district judges the role is one of cooperation with the Senate in making recommendations to the President. I believe in the role of bar associations we should not limit it to just the American Bar Association, and that is not meant as a slap to the American Bar Association. It is meant that we should include other bar associations in getting input on who would make the best judges.

Senator THURMOND. Mr. Hubbell, what do you think is meant by the advice and consent clause of the Constitution regarding the President's power in appointing judges?

Mr. HUBBELL. Senator, as I understand it, the President makes the nomination and the Senate advises and consents by reviewing the qualifications of the nominee and passes on them. I think that process has been going on since the beginning of time and should continue.

Senator THURMOND. In other words, the President makes the choice, but the Senate has to approve it?

Mr. HUBBELL. That is correct, Senator.

Senator THURMOND. That is the Constitution, isn't it?

Mr. HUBBELL. Yes.

Senator THURMOND. Now, according to the July 27, 1985, issue of the Arkansas Gazette, you were considering running for the U.S. Senate in 1986 as a Republican. The article quotes you as saying, "Like most people in Arkansas, I am an independent until I have to run for office and designate a party. Yes, I am a Republican." Do you still consider yourself a Republican? I thought perhaps you were that elusive Republican the President promised to appoint somewhere in the administration.

Mr. HUBBELL. Senator, you found that dark spot in my past. [Laughter.]

I am not a Republican, Senator. I did not run as a Republican.

Senator THURMOND. I think you are a good man. I expect to support you, in spite of some of the answers being a little bit indifferent.

Mr. HUBBELL. Thank you, Senator.

The CHAIRMAN. Thank you.

Senator Kohl.

#### OPENING STATEMENT OF SENATOR KOHL

Senator KOHL. Thank you very much, Senator Biden. Mr. Hubbell, as you know, in recent years we have been talking about tort reform, product liability reform. We haven't made any substantial changes yet, but there is vigorous debate on whether or not we need to change and, if we do, in what areas we need to change. Do we need to change, for example, our positions on joint and several liability, on fee-shifting, on whether or not we need caps?

I know that you are a person who has worked in this area, and I have no doubt that you come to this job with some thoughts about the need for product liability reform and tort reform. Would you be so kind as to give us some of your thoughts with respect to what we can expect from you by way of advocacy of product liability reform and tort reform?

Mr. HUBBELL. Senator, what initially you can expect from me is that we hope to pull together everyone who has an interest in this area to get all of their recommendations. I know there are reports and legislation already being considered to come up with a comprehensive solution to the cost of litigation. It is not one that can be limited to one specific item or the other.

Certainly, in the area of civil justice reform we have to look at alternative dispute resolution. We have to look at the cost of discovery. I know that from being a civil litigator. We spend too much money; we kill too many trees with all the paperwork that we do in the discovery process and we have got to come up with a better solution.

We have got to look in the area of tort reform, but we must include everybody in it. We cannot just listen to one side, and you will find from me a person who is going to listen to everyone and then hopefully come up with a comprehensive solution, not just piecemeal.

Senator KOHL. Well, I think that is encouraging. I would like to hear something from you in the area of joint and several liability, which I am sure you are familiar with. Someone who may have a 5-percent stake in an operation could wind up with 95 or 100 percent of all the liability for damages if the others fall away. Do you think we need to reform that equation? I wouldn't ask you precisely how, but I am just interested in your ideas as to whether or not that needs to be not just looked at, because that is an easy answer for anybody to say about anything, but would you reform that? Would you change that equation if you had the opportunity?

Mr. HUBBELL. Senator, I am familiar with joint and several liability because we have it in Arkansas. You can go all the way down to 1 percent and end up maybe being totally responsible.

Senator KOHL. Right.

Mr. HUBBELL. We certainly have to look it, and I am saying look at it, but I think that there seems to be some unfairness to it, but there are counterbalancing issues as well and we have to balance those. And so I don't have a hard, good answer for you, but I am going to commit to you that I am going to look at it. And I know you didn't want to hear just that I was going to look at it because I don't have a solution, but I can commit to you that that is the way to go because it is only one piece of the pie. I want to look at the whole pie.

The CHAIRMAN. The question is would you have drafted him.

Senator KOHL. Would I what? Would I draft him?

The CHAIRMAN. Would you draft him?

Senator KOHL. Certainly, I want him on my side for sure.

What about lawsuits which, by anybody's measurement, are sometimes frivolous, whether you are on one side or the other side? Lawsuits are filed sometimes that are frivolous and should never have been filed. What do you think about a loser pays system, so that people who file frivolous lawsuits will give it a second thought, knowing that they may wind up with an awful lot of costs?

Mr. HUBBELL. Senator, it is certainly a part of the piece. Fee-shifting is something that must be reviewed, but I know from my own personal experience that usually the people who file the most frivolous lawsuits—it wouldn't do you any good if you got a recov-



ery from them because they wouldn't have anything to recover from, so it might be futile. So I think when looking at the pie you have to have that as part of the equation as well.

Senator KOHL. Do I take that as a statement that you do believe we need to do something about preventing as much of this kind of activity as we can? You are not sure how we will do it, but you do feel there is a need to restrict this kind of activity in our country?

Mr. HUBBELL. Senator, I don't want to deny access to our courts to anyone, but at the same time I think everyone knows that there are lawsuits being filed that should not be filed and that we have to take a look at how we restrict that and yet allow everyone to have access to our courts.

Senator KOHL. How sympathetic are you with doctors who are forced, for fear of malpractice suits, to perform defensive kinds of medicine or not to perform medicine in the way in which they know it should be performed simply because they are afraid of a malpractice suit?

Mr. HUBBELL. Senator, I am familiar with malpractice suits. Certainly, in the area of professional malpractice lawyers sometimes feel like when they are sued it is groundless as well and that there is some preventative legal practice going on out there right now, and that is part of the reason the costs are so high.

So I have some understanding of that position, and yet we also do not want people to be denied access to our courts if true malpractice has occurred. It is something, I know, that is on the table in the Health Care Task Force and this body and other bodies are certainly going to have an opportunity to debate whether malpractice cost is forcing defensive medicine and whether that is driving up the cost of health care.

Senator KOHL. Well, many people feel—and have statistics to demonstrate—that we have more litigation in this country than in any other country in the world. First, if you do not concur entirely with what I have just said, then do you concur substantially with what I have said? Second, in your tenure here in the Justice Department, will you have a strong commitment to try to do something about that?

Mr. HUBBELL. Senator, I have a strong commitment to reforming our civil justice system so it is available to everyone, but it doesn't cost so much. I also recognize, and I think you do as well, that because we have a civil justice system—people do have a civil way to redress their concerns—that we still have been going on for a long period of time. And so our civil justice system is a way that we can reform our country and change our country without resorting to violence, and we never should lose that thought.

Senator KOHL. Well, I have enjoyed this opportunity to talk with you, Mr. Hubbell.

Mr. HUBBELL. Me, too, Senator. I look forward to doing it again.

Senator KOHL. Yes, and I look forward to working with you very much.

Mr. HUBBELL. Thank you.

Senator KOHL. Thank you very much. Thank you, Mr. Chairman.

THE CHAIRMAN. Thank you. By the way, since my attempt at humor did not work and it failed, I want to make a point. When

I said would he draft you, he is the owner of the Milwaukee Bucks. That is what I was referring to. I didn't mean——

Mr. HUBBELL. When we visited, I was aware of that because Sidney Moncrief played for Mr. Kohl and he is a true folk hero back home.

The CHAIRMAN. Senator Brown.

### OPENING STATEMENT OF SENATOR BROWN

Senator BROWN. Thank you, Mr. Chairman. Mr. Hubbell, you shouldn't feel bad. The Senator from Wisconsin has refused to draft any of us on the committee as well.

I want to extend my welcome to you, also, and I know you appreciate that we, of necessity, sometimes go through problems in our questions because that is a focus that I think is required to do our job, but that it doesn't indicate any lack of enthusiasm either for your service or lack of appreciation that you are willing to sacrifice in coming to serve our country. As you know, living costs here are somewhat different than they are in your home——

Mr. HUBBELL. They certainly are, Senator.

Senator BROWN. And pay will probably be quite a bit less, so we appreciate that and we appreciate the sacrifice you make.

I might say, speaking personally, you have come into an issue because of membership in a country club that has long been focused on by this committee. I know you appreciate that this is not the first time it has come up. It has come up—at least I am familiar in my brief tenure on the committee—it has come up with some partisan objections to appointees that President Bush had made.

I have always thought that the appropriate way to judge that was whether or not the man or woman involved intended discrimination, what their personal conduct was and what they did about it. I must say as I review the issue, your personal conduct was one of trying to change things, trying to push for integration, push for the club to be opened up, and I find that not only admirable, but what we would hope for. I hope that while your going through this has been painful that it puts the issue to rest.

I must say there was an outstanding judge in Colorado who was turned down for the bench simply because he had been a member of a club that had not acted, or at least had not acted as they should, in recruiting members. I know that judge would have made an outstanding member of the Federal judiciary and was very pro-integration, and was turned down not by what he stood for, but by what others in the club stood for, and I thought it was unfair. I want to assure you Republicans are not going to try and play games with you on this issue. We thought you ought to look to the individual all along, and I intend to hold that view.

One of the things, though, that has come up in this process are questions that have been raised by a stockbroker you dealt with almost a decade ago, and I want to turn to that not as an indication of an allegation on my part, but as part of our responsibility, I think, to clear the air and get the facts put together. So I want to ask you a series of questions that relate to that and I hope you will feel free to expand on my questions if you want to. Don't feel bound by my questions in your comments.

First of all, as I understand it, they relate to a purchase of a stock called Arco——

The CHAIRMAN. Arkla.

Senator BROWN. Arkla. It is a purchase that was made in April 1983 and, I believe, a disposition that took place several months thereafter of that stock. I know you are familiar with the term "insider" and that it can relate to people who have inside information, special information, about Arkla. They often are directors or officers of the company, or people who have access to that information.

Did you know at that time—at that period that you purchased the stock, did you know anyone who would be classified as an insider of Arkla?

Mr. HUBBELL. I knew the president, Sheffield Nelson. I knew—I think on the board was Mack McLarty; I think on the board was Myra Jones, who was on the city board with me. I am sure I know other board members. It is an Arkansas company.

Senator BROWN. Were you familiar with people who represented that company, a law firm that represented that company who would have access to inside information as well?

Mr. HUBBELL. Senator, I don't know who represented Arkla Gas in 1983, but I am sure if it was an Arkansas law firm, I would have known who they were.

Senator BROWN. Did anyone talk with you about Arkla before you purchased the stock, giving you information about it?

Mr. HUBBELL. No, sir; unless it was a stockbroker, no, Senator.

Senator BROWN. So you did not, or your statement is you did not have access to any inside information on Arkla prior to your purchase of the stock?

Mr. HUBBELL. Senator, I have never bought a stock based on inside information.

Senator BROWN. You practiced in Arkansas with the Rose law firm?

Mr. HUBBELL. Yes, Senator.

Senator BROWN. And how long have you practiced with that firm?

Mr. HUBBELL. Other than the 4 months that I was on the supreme court, for 20 years.

Senator BROWN. And does that firm represent an entity called Beverly Enterprises?

Mr. HUBBELL. It has, Senator, yes.

Senator BROWN. Does it represent an enterprise called Arkansas-Oklahoma Gas Corporation?

Mr. HUBBELL. Arkansas-Oklahoma Gas Corporation? Yes, Senator, it has in the last few years.

Senator BROWN. I take it by that answer you mean that it did not represent it in 1983 when you purchased the stock of Arkla?

Mr. HUBBELL. Senator, I am pretty confident of that. Arkansas-Oklahoma Gas is represented by one of my partners, or former partners, named Charlie Baker and I don't think he came to the firm until 1985. I am familiar with the article and they reference an Arcoma Co. Arcoma is not Arkansas-Oklahoma Gas. They are separate companies.

Senator BROWN. Does the firm represent Stephens, Inc.?

Mr. HUBBELL. Stephens, Inc.?



Senator BROWN. Stephens?

Mr. HUBBELL. Yes.

Senator BROWN. And do you know how long they have represented Stephens, Inc.?

Mr. HUBBELL. Senator, I don't know if we did any bond work for Stephens, Inc., before I joined the firm. I suspect we started doing some bond work with them and other representation in the late 1970's or early 1980's.

Senator BROWN. Your firm has represented Firestone Tire and Rubber Co.?

Mr. HUBBELL. We represent them in tire litigation, yes, Senator.

Senator BROWN. In 1983 or thereabouts, did Stephens, Inc., have an agreement for the purchase of equity in Arkla or a right of first refusal?

Mr. HUBBELL. Senator, I don't know.

Senator BROWN. So as far as you know, they did not, or you are not aware of any agreement they had?

Mr. HUBBELL. I am not aware of any agreement whatsoever.

Senator BROWN. That they had with Arkla?

Mr. HUBBELL. If they had one or didn't, I am just not aware of anything like that.

Senator BROWN. You were a participant at this period of time in an investment group known as Midlife Investors?

Mr. HUBBELL. Yes, Senator.

Senator BROWN. And did Midlife Investors invest in Firestone?

Mr. HUBBELL. Senator, I am not totally familiar. I haven't gone back, but I believe we probably did buy some Firestone stock, yes.

Senator BROWN. And would that be the same Firestone that your firm represented?

Mr. HUBBELL. Yes.

Senator BROWN. What action did you take to advise your client that you had purchased the stock?

Mr. HUBBELL. Well, Senator, we wouldn't advise our client before we bought a publicly held stock. We do have procedures in the firm to ensure that we don't trade on any insider information and to make sure that if we have a publicly held client that if we buy—any individual in the firm buys stock, that there is no inside information within the firm before we buy the stock or sell the stock.

Senator BROWN. And I think that is standard for most law firms that walk through this.

Mr. HUBBELL. Yes.

Senator BROWN. Does that mean that you did not have inside information on Firestone when you purchased it as part of that group?

Mr. HUBBELL. I can assure you, Senator, with regard to Firestone or any other stock, I never had any insider information before I bought or sold any stock.

Senator BROWN. Well, I thought it worthwhile to walk through that issue. I know it is not the most pleasant part of this process that you are going through, but I think that putting on the record that no one talked to you about Arkla, that you had no information—and that is your testimony, as I understand it—I think, is helpful in putting this issue in its proper perspective.

The CHAIRMAN. Will the Senator yield for a second?

Senator BROWN. Sure.

The CHAIRMAN. I would like to compliment him on doing that. Had it not been raised, I was prepared to do that because the minority and majority staff has looked into the issue raised by Mr. Drew and, as you accurately point out, the only thing that Mr. Drew can say for certain is there was stock purchased and stock sold, and anything else was conjecture on his part and he acknowledges that. But I think it is important, since it was raised, and it was raised with Senator Hatch and with me in a letter from Mr. Drew, and was in the press, that it be aired, and I thank you for doing it.

Senator BROWN. I don't always get those compliments from the Chairman. I am always delighted when it happens.

Mr. Hubbell, let me just close with a thought. You have a period of exciting service ahead of you. About the only way you are really measured as a human being is by what others say about you when you are not around, and I have heard some very fine things about you. You have a number of people who know you well who think the world of you, and we look forward to seeing your service to our country.

Mr. HUBBELL. I do, too, Senator.

Senator BROWN. Thank you.

Mr. HUBBELL. I look forward to working with you.

Senator BROWN. I yield back, Mr. Chairman.

The CHAIRMAN. Thank you very much. There is one other of our colleagues who wishes to ask you questions and he has a conflict. What I am going to do is recess for 5 minutes, give you a break here, and contact that colleague to determine whether or not he can be here within a reasonable time to ask you questions, and if not, whether he would be willing to submit the questions in writing because I don't believe there is anyone else. We have pretty well covered the waterfront.

We are not adjourning. We will recess for 5 minutes and then come back to determine whether or not we will wait for that particular Senator or whether we will adjourn. Thank you.

[Recess.]

The CHAIRMAN. Senator Specter, who was necessarily absent, is on his way back to ask a round of questions. In the meantime, Senator Cohen would like to ask a second round of questions and clarify a few things. So, with that, I will yield to Senator Cohen.

Senator COHEN. Thank you, Senator Biden. Do I understand that I am sort of filibustering until Senator Specter gets here?

The CHAIRMAN. Yes; you are assigned to hold the fort until Senator Specter gets here.

Senator COHEN. There are a number of members of the media who are urging us to conclude quickly so they can have a lunch break.

The CHAIRMAN. I don't blame them. That is why I am urging Senator Specter to get here quickly, although he is in a difficult situation here.

Senator COHEN. I will be very brief. Mr. Hubbell, I did not hear Senator Brown's questions concerning the Arkla matter and perhaps you could explain it for my benefit and correct me if I am wrong in these particular facts. I am not familiar with them, but

know only what I have read in articles. If you will just clarify it for me, it would be very helpful.

My understanding is that in April 1983 you purchased 500 shares of stock in Arkla, is that correct?

Mr. HUBBELL. That is correct, Senator.

Senator COHEN. And at that time, the stock was worth roughly \$18.25?

Mr. HUBBELL. Senator, I am having to rely a little bit on the newspaper article, but that sounds right.

Senator COHEN. OK, that is approximately it. I don't really care about the numbers in terms of the amount. Now, were you normally investing in stocks at that time?

Mr. HUBBELL. Yes, I was.

Senator COHEN. OK, so that is just one aspect of your portfolio?

Mr. HUBBELL. That is correct, Senator.

Senator COHEN. OK. Now, in June of that same year you sold 300 shares of the stock at roughly \$25?

Mr. HUBBELL. That is correct, Senator.

Senator COHEN. And then you sold the other 200 in July for approximately \$24.50 or \$25?

Mr. HUBBELL. That is correct.

Senator COHEN. We are not talking about a great deal of money in terms of the amount of profit involved, but that was essentially the transaction. Now, you were a member of the firm of which Ms. Clinton was a partner?

Mr. HUBBELL. Yes.

Senator COHEN. You were a partner with her?

Mr. HUBBELL. Yes.

Senator COHEN. Right, and Mr. McLarty was then what? What was his position with Arkla at that point?

Mr. HUBBELL. Senator, I am not real sure. For a while, Mr. McLarty came on, I think, in some role with Sheffield Nelson. I wasn't sure if he came on as—when he came on as president.

Senator COHEN. So you weren't aware of his position specifically then at that time?

Mr. HUBBELL. No, I was not.

Senator COHEN. OK. Was he a classmate of yours in school?

Mr. HUBBELL. We both went to the University of Arkansas at Fayetteville. He was a year ahead of me.

Senator COHEN. OK, fine. According to the article I have read, a firm of Wright, Lindsay, et cetera, also purchased 500 shares of stock in Arkla one day after you did?

Mr. HUBBELL. I am not aware of that, Senator, at all.

Senator COHEN. Did you know any lawyers in that firm?

Mr. HUBBELL. Yes, I do, Senator.

Senator COHEN. Now, is that the firm that then-Governor Clinton was a member of the year before, 1982, when he was a private citizen? He worked for that firm?

Mr. HUBBELL. I think the then-Governor, now President, was with that firm for 2 years.

Senator COHEN. Right.

Mr. HUBBELL. In, I believe, Senator, 1981 and 1982.

Senator COHEN. Right. So it creates at least the perception, if not the reality, that there is some kind of interconnection between the



two firms or members of the firms who are investing in the same stock, purchasing it at almost identically the same time and selling it roughly at the same time. Does that create at least some kind of an appearance of some insider trading going on?

Mr. HUBBELL. Senator, I don't know anything about any Wright firm lawyer buying or selling. I didn't then and don't now. But Arkla Gas is an Arkansas company and a lot of people in Arkansas buy and sell Arkansas stock.

Senator COHEN. Right, and do you know this Mr. Drew, the stockbroker?

Mr. HUBBELL. Yes, I do.

Senator COHEN. My understanding is he has raised some questions, at least, that there may have been an insider information aspect to this particular transaction. Did he discuss this with you at any time?

Mr. HUBBELL. No, Senator, he never discussed it with me, and let me assure you I never traded in any stock on any insider information.

Senator COHEN. Have you had any conversations with Mr. Drew about this whole matter at any time, following the selling of the stock?

Mr. HUBBELL. Senator, I have not talked to Mr. Drew about any stock since he left E.F. Hutton.

Senator COHEN. So as far as you knew, from April to June and July, you bought stock and then you sold stock, and you purchased and sold other stock at various times throughout your private career?

Mr. HUBBELL. Yes, I have. I think we provided the committee with information that I bought and sold eight or nine stocks in that same year.

Senator COHEN. And you had no information whatsoever about a takeover of Arkla?

Mr. HUBBELL. No, Senator, I had no information about Arkla.

Senator COHEN. Or that the stock was about to rise with news of the takeover about to take place?

Mr. HUBBELL. No, I did not.

Senator COHEN. Those are the only questions I have.

Mr. HUBBELL. Do you want to talk about football? [Laughter.]

Senator COHEN. No, but I would like to talk about basketball, which is my sport. I don't have any more questions at this time. I guess I am going to filibuster because no one is around. Can I move over one more seat? [Laughter.]

I was going to take issue with Senator Metzenbaum's statement today about exemptions from the antitrust laws for hospitals and doctors. I think there is a serious problem throughout this country where many small towns and communities are in what I would call a medical industrial arms race where each hospital has to have the latest in technology, be it MRI or a CAT scanner, in order to try to attract the clientele or the patients to build that hospital up.

We are escalating the costs of medical care in this country unnecessarily, in my judgment, and it would be very beneficial to allow some of those hospitals to share technology, a CAT scanner or an MRI or whatever other type of sophisticated and very expensive equipment is being purchased today to render services to the pa-

tients, to help reduce the cost without being sued by the Justice Department for a violation of the antitrust laws. So I take issue with what Senator Metzenbaum was suggesting that under no circumstances can you do it by exemption.

I have found, for example, in Maine they have now allowed, by passing a local law, hospitals to engage in precisely that type of arrangement. Suddenly, we are seeing a great deal of cooperation rather than competition, and as a result of that we are going to hopefully save quite a few dollars in the field of medical care.

I think that it is not enough to say that there should be no exemptions from the antitrust laws. I think if you can make out a case with the Justice Department supervising it, if necessary, or a State government supervising it, you should be allowing these types of cost-sharing arrangements in order to hold down the costs of medical care in this country.

This is unfair of me to do while Senator Metzenbaum is not here because he and I could engage in quite an exchange and colloquy, but I just wanted to let you know that there is a difference of opinion on that issue.

Mr. HUBBELL. I recognize that, Senator, and I look forward to the debate that I know is going to occur in the area of health care.

Senator COHEN. Senator Biden, I don't have any further questions.

The CHAIRMAN. OK; thank you very much, Senator. Senator Specter is literally a block away and should be here any moment. Let me, if I may, ask you a few questions myself while we are waiting.

With regard to the Civil Rights Division of the Justice Department, will the head of the Civil Rights Division report to you directly?

Mr. HUBBELL. Yes, Senator.

The CHAIRMAN. And how will it work on policy matters? There is a fairly broad area of discretion that section 5 grants the Government in the Civil Rights Act, and how will those policy decisions be made? Will they be made at the level of the head of the Civil Rights Division or will they be made at the Attorney General's level and work through you? Can you speak with me about that for a minute?

Mr. HUBBELL. Without consulting with the Attorney General on this, I envision that with regard to policy matters that it will involve discussions and formulation of policy at the Attorney General and my level.

The CHAIRMAN. Thank you.

Senator SPECTER. Thank you for accommodating the committee. I appreciate it.

#### OPENING STATEMENT OF SENATOR SPECTER

Senator SPECTER. Thank you very much, Mr. Chairman. Thank you, Mr. Hubbell. I appreciate the opportunity to question the witness. Senator Biden had called me. I was downtown at an interview with Knight Ridder which had been set up some time ago. These hearings are hard to calculate in terms of duration, and I know your interest in being long and strong and I thought certainly you would have gone longer than 5, which is when we fin-

ished up yesterday afternoon with the hearings on the Deputy Attorney General.

I was here this morning and went to another hearing. We had the Secretary of Labor. So I do welcome this opportunity to ask a few questions, Mr. Hubbell, and I thank you for coming by and meeting with me in my office where we have had a chance to talk. I have had a briefing from Richard Hertling, my counsel on the committee, on my way back to the hearing.

I begin with a question which came up yesterday as to communications from the White House, and I understand that you have already said that the only communications would be from the counsel to the President to one of the three, Attorney General, Deputy Attorney General, or Associate Attorney General. Now, is that from the counsel himself and nobody else?

Mr. HUBBELL. It would be from the White House counsel's office. There would certainly be times that the White House counsel, Bernard Nusbaum, is out of town. It might come then from Vince Foster, Steve Neuwirth, some of the other members of the White House counsel. But it is my understanding that Mr. Nusbaum has requested that contacts with the Justice Department go through White House counsel.

Senator SPECTER. Well, speaking for myself, because that is all I can speak for, I have a problem with that. I believe that there ought to be a very narrow limit as to who can speak for the President, and I have difficulty with having that delegated to others than the counsel himself, Mr. Nusbaum.

As I said yesterday, I also have a problem—and again I am speaking just for myself—about having the information relayed to the Attorney General, the Deputy, and the Associate Attorney General. A number of us asked Mr. Heymann to give us something in writing before we vote on these items so we know about what kinds of cases we are talking.

Senator Biden very accurately asked me about one of my concluding comments when I said I would call Mr. Heymann about the navy yard case where we had a decision yesterday afternoon at about 2:30, and Senator Biden said, "well, there you are calling up the Justice Department." But I am one of the lawyers on the case, arguing the case, and I think it fits where lawyers can call up the Justice Department. I did not call in my capacity as a Senator, although I am a Senator. So there is no doubt that I wasn't trying to exercise any special influence.

But I think that the prosecutor, the Attorney General of the United States, ought to have the discretion to enforce the laws, and I do think there are cases where the President needs to talk to his Attorney General on establishing policy. I would like to see you give us in writing precisely what lines there are where it is appropriate for someone other than the President to call someone other than the Attorney General so we know precisely with what it is we are dealing.

Mr. HUBBELL. Senator, I committed, and I understand Professor Heymann did yesterday, to give those to this committee in writing.

Senator SPECTER. OK, that would be very good. You have an unusual situation, Mr. Hubbell, and I think it is a very good one, having a longstanding relationship with the President and with the



First Lady, having practiced law with Ms. Hillary Rodham Clinton and knowing the President as you do.

There is naturally some area of concern, or at least an area of interest as to the extent that the President of the United States or the First Lady may have some involvement of matters in the Department of Justice. If you are willing to tell me, I would like to know what contacts, if any, you have had with the President, and not the substantive matters, but what contacts, if any, you have had with the President in your service to date in the Department of Justice on matters affecting the Department.

Mr. HUBBELL. With regard to matters affecting the Department, Senator, as opposed to personal matters?

Senator SPECTER. Correct. If you have had a talk with him about something that is personal, something that relates to your own activities and not to Department of Justice matters, I think you still have standing to have those conversations without telling the Senate Judiciary Committee or C-SPAN about it. But if you talked to him about Department of Justice matters, then that raises another issue and perhaps we can inquire, or perhaps we shouldn't.

Mr. HUBBELL. Senator, with regard to Department of Justice matters, my conversations with the President have been limited to discussions regarding the appointment of a Supreme Court nominee.

Senator SPECTER. And only the appointment of a Supreme Court nominee?

Mr. HUBBELL. Yes.

Senator SPECTER. And how about with the First Lady, Mr. Hubbell?

Mr. HUBBELL. All my conversations with the First Lady have been on a personal nature, except for me to suggest that our anti-trust career lawyers work with her Health Care Task Force.

Senator SPECTER. Nothing more?

Mr. HUBBELL. Nothing more.

Senator SPECTER. OK. On the subject of drug enforcement, I believe it is very important to take a fresh look at the allocation of Federal funds, which are now in excess of \$13 billion, and I talked to you about this in our conversation in my office and I want to repeat it for the record. I press this point because as the number three person in the Justice Department, even though you do not have line responsibility for the Criminal Division, it is my understanding that you do for criminal law enforcement of some of the other divisions.

I would ask you to take a look at that allocation to see if it might not be more effective to have an equal division between the so-called supply side—that is, international interdiction and street crime and task forces—as opposed to the so-called demand side on education and rehabilitation. I would be interested to know if you have any thoughts that you would care to express at this time on that question.

Mr. HUBBELL. Not yet, Senator. I know we are going to be working in these areas. Phil Heymann is going to have the direct responsibility and I would hate to bind Phil Heymann.

Senator SPECTER. Earlier this week, I had an opportunity to meet with former Police Commissioner Lee Brown, who has been

nominated to be the Drug Director, and it is my understanding that he is going to have Cabinet status. A question I have in mind is how do you anticipate working with a new Cabinet officer on the drug issue when so much of that responsibility falls to the Department of Justice on the prosecution line.

Mr. HUBBELL. Senator, I know that Attorney General Reno is excited about having Mr. Brown be head of the drug office.

Senator SPECTER. How do you feel?

Mr. HUBBELL. I feel the same way. There are many agencies of this Government, not just Justice, that are involved in the drug war, so to speak, and we need to have better coordination among the various departments of this Government in the area of drug policy.

Senator SPECTER. And you anticipate no problem with smooth working between the new department chief and the Justice Department?

Mr. HUBBELL. I don't anticipate any problems. Senator, I would like to correct one—you asked me about contacts with the President. I have also had discussions with the President regarding specific nominees to Assistant Attorney General positions. I forgot about that and I wanted to correct that.

Senator SPECTER. How about with respect to judicial appointments around the country?

Mr. HUBBELL. No, only the Supreme Court.

Senator SPECTER. Let me just express one word of concern about the speed of those appointments. I wrote to the President on January 20 recommending some nominees for Pennsylvania, and I understand the President may be looking in other directions for recommendations, but the vacancies in those judgeships are very, very important. When a judge is not sitting, there are many things he or she could be doing which are very important. So I am not asking you for a response, but I would just urge you to do what you can to speed up that process.

I noted in your biographical materials that you took an appointment for 4 months to be chief justice of the Supreme Court of Arkansas, and my question to you is what skills did you develop, if any—we always ask “if any”—which would be of assistance to you in carrying out your work in the position of Associate Attorney General.

Mr. HUBBELL. Senator, when I served on the supreme court it gave me a different insight as to how lawyers practice before the court, but it also gave me terrific insight into what is needed to be a good judge, including judicial temperament, intellect, character, and I hope those insights I can bring to the Department of Justice. As well as having served on the supreme court, I had the limited time to work in matters of criminal law, where I don't in my normal practice, and it has been helpful to me already in understanding certain areas of criminal law.

Senator SPECTER. As chief justice, did you write opinions on cases involving criminal matters?

Mr. HUBBELL. Yes, I did.

Senator SPECTER. How many?

Mr. HUBBELL. I don't have a division, Senator. I think I wrote 18 majority opinions, but I may be wrong there. I think that is the

approximate number. We have given all the opinions to your staff, and I would say about half and half were criminal versus civil.

Senator SPECTER. On the question of Federal coordination with local coordination, here again I would urge very careful attention to as much coordination as you can have. This committee was instrumental in setting up a strike force in the Eastern District of Pennsylvania where Federal authorities cooperated with local authorities and it has become a model nationwide.

Even though you are not going to be directly in charge of the administration of the Criminal Division, I would urge you to take a very, very close look at that subject and to promote the activities on the joint nature between the Civil Division and the Criminal Division to the maximum extent that you can. Do you have any thoughts on that subject?

Mr. HUBBELL. Senator, I do, as well as the Attorney General has spoken many times of the need of cooperation between State, local and Federal agencies, how important it is for that cooperation to be worked with and nurtured, and hopefully this administration will direct its efforts to that cooperation.

Senator SPECTER. The subject of Federal prison facilities is a very important one and the funding is not as high in the current budget projection as I think it ought to be and as many people think it ought to be. There are some of us who have been proposing for some time that there be a Federal responsibility on certain State crimes. I have introduced legislation, for example, on the career criminal bill. I have done that on the Federal level with the armed career criminal bill of 1984, but also on the States which use the career criminal bills for habitual offenders, and have proposed that the Federal Government provide jails for any State which is willing to undertake to sentence someone for being a career criminal.

As you know, and just a word of explanation for the viewers, if someone is convicted of three or more major crimes, in more than 40 States that person is then subject to a sentence of life imprisonment. Senator Biden has introduced legislation in the past on regional jails where the Federal Government would undertake the responsibility for certain hardened criminals.

Right now, it is hard to send some State convicts to State jails because there is no room, and I would be interested in your view, as a matter of principle, as to whether you think that is a good approach, and if so what you would be willing to do about it.

Mr. HUBBELL. Senator, I don't have a hard view because it has not been an area that I have focused on. However, I know that it is Janet Reno's position, and certainly mine and Professor Heymann's, that for those career criminals, those people who commit violent crimes, they need to be put away for a long time and if it takes Federal cooperation with your State governments and local governments, then that is what should be done.

Senator SPECTER. During the course of your last answer, the red light went on, so I will conclude. I want to just make note of the fact that I have consciously not asked you questions about the country club because I understand that you have resigned and that that question has been gone into in some detail in the hearings earlier. I will just say that the resignation is, of course, important,



but at least in the mind of this Senator that doesn't dispose of the entire issue. The question really is the extent of your efforts to avoid discrimination and integrate the country club during the time that you were a member of the country club.

Thank you very much, Mr. Hubbell.

Mr. HUBBELL. Thank you, Senator.

Senator SPECTER. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

Senator Grassley.

Senator GRASSLEY. It is kind of like I tell the high school graduates at commencement, I may be the last thing between them and their diploma; I may be the last thing between you and getting done at this committee.

I want to make what I think is a compliment. If I analyze previous hearings under both Republicans and Democrats—I hate to say I am going to give you a compliment because then you will wonder where will the next shoe drop, you know. But it seems to me that several times you could have hidden behind the confidentiality of your communications between you and the President and the First Lady and maybe some other places both in questions from me as well as from my colleagues and I think you have been extraordinarily—if I remember past hearings, have been extraordinarily forthcoming in doing that, which I think expresses a candidness that, if it continues, is going to enhance relationships between this committee and people at the Justice Department.

If my summation of that is wrong and you aren't any more forthcoming, I will ask my colleagues to correct me, but it seems to me you have been very candid in some of your answers, particularly in those places where you could have hidden behind that sort of confidentiality that a President legitimately can have with people who are close to him.

Before I ask you a question about false claims, I just have a comment on the country club issue, but using that as an example of some other things that we deal with here that I hope maybe will leave a point of view with you to consider as an administrator over cases, particularly civil rights cases, within the Justice Department.

In regard to the country club, what I would call neutral policies of membership, I think that we agree that it can have a disparate impact on minorities. I talked about, you know, the expense of getting in as an example. Of course, disparate impact is one theory of discrimination. In fact, the Congress spent 2 years on the civil rights bill which dealt primarily with that issue of disparate impact.

Your country club has neutral policies, but they had and continue to have a disparate impact upon minorities. You said, and I am not going to argue with you, that the club doesn't discriminate. So I am suggesting that there may be other cases of disparate impact that aren't discrimination; the country club is an example of a case of disparate impact that isn't discrimination. So as you supervise civil rights enforcement for the Department of Justice, I hope that you will keep that experience in mind.

On false claims, you are going to oversee the Civil Division which has responsibility for false claims. You know, as I told you in my

office, we rewrote a significant part of that act in 1986 and we particularly that year strengthened the qui tam provisions. In the last few years under this amendment, the Government has recovered \$500 million or more, and hopefully the amendments which empower individuals who have evidence of fraud to sue on behalf of the Government have served as a deterrent to some fraud, as well as just recovering money.

Now, last December, for instance, the Government settled a \$110 million case involving medical laboratories, and I think the health care area will be the next frontier beyond the defense industry, which I think was my primary motivation for the enactment of the legislation in the first place. The health care industry is going to be the next area in attacking fraud on the Government.

As I told you before, under Republican administrations the Department of Justice never fully embraced the law. It has merely been tolerated, and in some cases there has been even open hostility toward whistleblowers who bring cases. So my first question is to what extent can I count on your leadership to change the attitude within the Department of Justice about such false claims cases?

Mr. HUBBELL. Senator, as you know, when Janet Reno answered her questions about it, the first issue is its constitutionality, and it carries with this administration a presumption of constitutionality. I am aware that you are proposing amendments to in some way strengthen the False Claims Act, and we look forward to working with you on that. I can assure you that our attitude is to be one of cooperating with people who discover fraud and to try to eliminate fraud within the Government.

Senator GRASSLEY. As we consider legislation, though, let me put it into perspective. The basic thrust of the law is pretty sound as far as I am concerned, and any amendments that might be considered would be pretty much fine tuning. I also want to compliment the Department because thus far I know that the Department has publicly stated that a statement by former Attorney General Barr that did question the constitutionality of it does not stand as Department of Justice policy right at this particular time, and so that is a very positive movement that the Department has made.

Now, you brought up the question of constitutionality. The Department before you had never argued on behalf of the constitutionality of the 1986 amendments. We have always had to get the Senate legal counsel to defend the constitutionality of it in the district courts, and so far every court case has been positive about its constitutionality.

What are the prospects, then, for the Department of Justice taking the lead on this issue and arguing for the constitutionality of the law? You did state a presumption of constitutionality. Would that go, then, to defending the constitutionality within the courtroom?

Mr. HUBBELL. Senator, at your request, Attorney General Reno when she took office commissioned work within the Department to review the constitutionality, carrying with it that presumption, and that is currently being done right now. Once the Department does take a position, I am sure we will be happy to make that position known.

Senator GRASSLEY. Another area that will fall under your supervision is the whole area of civil justice reform. I have had a long-standing interest in alternative dispute resolution mostly as a way of getting disputes out of the costly and lengthy and adversarial courtroom process. Of course, we compound some of these problems because we have a habit here in the Congress of creating new rights and then telling the Federal courts that they are the exclusive protector of those rights. I think that when we create new rights, we should provide alternatives to litigation for resolving those disputes concerning those specific rights that we legislated.

Would you work with me as Congress considers creating new rights to come up with good alternate dispute resolution mechanisms so that we don't just continue to clog the Federal courts with new cases particularly that result from laws yet unpassed?

Mr. HUBBELL. Senator, as I have said, I am committed to an overall plan of civil justice reform. Certainly, one of the areas that we have to look very hard at and work with you on is the area of alternative dispute resolution.

Senator GRASSLEY. Last question: What will be the division of labor between the White House counsel's office and the Department of Justice on the selection of Federal judges?

Mr. HUBBELL. Senator, in the area of district judges it is my understanding that Senators will be making recommendations and they have their own ways that they are going to make recommendations of potential candidates for district judges. Then those recommendations will be forwarded to the Justice Department to look at the qualifications, and once those qualifications have been assured then we will notify the White House and hopefully the nominations will go forward to this body.

Senator GRASSLEY. OK, but that is a process, but that doesn't delineate—or maybe you did and I missed it—delineate a division between what Justice will be doing and what the counsel will be doing at the White House in the process of selecting judges.

Mr. HUBBELL. In the area of district judges, I believe the first step is with the Senators, as I said.

Senator GRASSLEY. Yes.

Mr. HUBBELL. And then it goes to the White House where those recommendations are taken in. There are certain reviews that have to be made, security type reviews and things of that sort. Then they will be forwarded to the Justice Department for looking at the qualifications.

Senator GRASSLEY. OK; I think in our previous administration, didn't they go from the Senate to the Justice Department to the White House?

The CHAIRMAN. Well, I am not being facetious when I say that one of the problems was that the Attorney General never knew who was in charge, whether it was Boyden Gray—I mean this sincerely. The fight was whether Boyden Gray and his assistant, Ms. Lieberman—whether or not they were the ones making the choices or whether the Attorney General had any input.

Although I am not required to disclose it, I have had extensive conversations personally with the President on this matter, as I have had with other members of the White House, as I have with the Attorney General. The distinction and the difference will be



here that on district court nominations, a Senator—we are going back to the time-honored tradition that the Senators of the majority party—notwithstanding my great respect for Senator Specter, any judge he recommends has no relevance, any more than, I might add, there was any relevance to the recommendation of a Democratic Senator. I am the chairman of this committee and Senator Roth, nor should he have, not once in 12 years ever asked me who I thought should be appointed to the bench. I never demanded it, nor did I expect it, and so I don't think anyone should think it should be different.

But at any rate, having said that, the recommendation will go from a Senator, unlike before. Technically, it went to the Justice Department, but as you know, Senator, because so many of your colleagues approached us, it always got tied up in the White House and no one ever knew who was on first base or second or third, or who was in charge.

So my recommendation to the President, which he accepted, was that there should be one person in the White House who is the traffic person, who is the person who would take in these recommendations coming from Senators and other sources and make a first cut as to whether or not that person did, in fact, meet the minimum requirements. Then, as I understand it, they could call on the White House—this person happens to be in the White House counsel's office, as I understand it—would then contact the Attorney General's office for a more thorough look because you have the resources to go back and read, if it is a sitting judge, their opinions and go through the whole process before a recommendation goes to the President from, as I understand it, the White House counsel or the Attorney General—it can come simultaneously—as to who will be sent back up to the U.S. Senate.

So the Justice Department, as I understand it, plays a role, but the key person, the focal point, is an individual within the White House through whom all these nominations will move, so we don't have to go through what a lot of Republican colleagues, as well as Democratic colleagues, complained about last time—and I don't say this to be critical of the last administration, but to cite what happened—of not knowing who to contact to find out whether or not so-and-so was going to be recommended or whether your recommendation or the Senator from South Carolina's recommendation was in the pipeline.

Now, on circuit court judges it is a different story.

Senator GRASSLEY. That was going to be my next question, so either you or him I would like to have answer that question.

The CHAIRMAN. Well, I can only speak for—obviously, the witness knows better than I do, but my understanding of what I have been told as Chair of this committee, as has the ranking member been told, is that on circuit court judges historically, since they cover more than one State, the recommendation of a Senator is less significant. They will be considered if a Senator recommends someone.

Senator GRASSLEY. But the role of Justice as opposed to the White House?

The CHAIRMAN. The role of Justice will, as I understand it, be the same. There is no difference in the role of Justice between—

there is a difference in the role of the Senators, but not a difference in the role of Justice, whether it is a Supreme Court Justice, a circuit court of appeals judge or a district court judge or a judge for a specialized court, like the Tax Court or whatever.

Is that correct? Is that your understanding?

Mr. HUBBELL. That is correct, Senator. That is my understanding as well.

Senator GRASSLEY. Well, I have no more questions. I will just make one final comment. Remember when I visited with you in my office, I said that I am interested in who knows something about agriculture and you told me about your Nebraska farm. I expect you to keep your roots in that Nebraska farm so when there is somebody in the Justice Department that I want to talk about agriculture with, I will come to you.

Mr. HUBBELL. Thank you, Senator. That is my wife's Nebraska farm, though.

Senator GRASSLEY. Well, I hope she will let you keep your roots there.

Mr. HUBBELL. I bet she will.

The CHAIRMAN. Well, Mr. Hubbell, for what was supposedly going to be such a tough road, I thank my colleagues for the courtesy they have extended to you and you for your forthrightness in your answers. As you can tell by the committee, I will be very surprised if you are not overwhelmingly approved by this committee and by the U.S. Senate.

We all look forward to working with someone who has had extensive practical legal experience, as well as on the bench, as well as, and I mean this sincerely, someone who has stood for office, has been the mayor of a large sized city, a significant sized city, and understands the concerns and the immediacy of the concerns of the American people for whom we all work.

So I compliment you and I would like to compliment your son and your daughters and your wife, and tell your other child who is taking a final exam how lucky she was to not have to sit through it all, but I hope it has not been too tortuous for you. We thank you very much for being willing to do this. We look forward to your confirmation.

[The prepared statement of Mr. Hubbell follows:]

#### TESTIMONY OF WEBSTER L. HUBBELL

Mr. Chairman and Members of the Committee: I am very honored to be before you today and I have appreciated the opportunity to visit most of you over the past several weeks. I want to thank Senator Bumpers and Senator Pryor for their generous introductions and my family and friends for being here with me.

It is an honor and a privilege to have been selected by Attorney General Reno and nominated by President Clinton to serve as the Associate Attorney General. When I was a boy growing up in the states of Arkansas, Tennessee, and Alabama, the Justice Department brought change for the better to my part of the country. The lawyers were the best and the brightest acting with courage and conviction in the face of adversity. It is a rare opportunity to be given the chance to work for an institution that I know from my own personal experience can be a force for significant and progressive change.

I have learned during the past few months that the Department of Justice still represents the best and the brightest, and that it stands ready to be reinvigorated and redirected. If confirmed, it will be the highest honor of my professional life to be a part of the Janet Reno Justice Department and the Clinton Administration.

In the words of Micah, we should always do justice, have mercy, and walk humbly. Therefore, I am always reticent to talk about myself. However, for you to evalu-

ate me you must know a little of my background. As a civil trial lawyer for 20 years, I have tried to use the law to do what is right for my client, whether that client be a large corporation, the Audubon Society or an individual involved in a family dispute. I know firsthand that the cost of litigation has gotten out of hand. I have had to tell clients you simply cannot afford to go to court; I have seen their despair. Senators, we must have a civil justice system that works, and allows all our citizens regardless of their financial means access to our system of justice. As Chief Justice of the Arkansas Supreme Court, I learned from the other side of the bench about the need for judges who are fair, have the appropriate judicial temperament, and have the requisite experience and qualifications to serve as a judge. I hope to bring my experience and insight to the Justice Department.

I served as the Chairman of the Arkansas Bar Association's Committee on Ethics and Responsibility for many years, and served on the Arkansas Ethics Commission created by then-Governor Clinton to draft an ethics and lobbying disclosure statute because there was none. When the Legislature failed to enact his legislation, the Governor asked me to help in the effort to pass similar legislation through the initiative process. I am especially proud of having been involved in this effort. I believe that our public servants have a heightened ethical obligation to the people they serve. Those who have the privilege of serving in the Justice Department have the same heightened obligation to the American people: to work for the cause of justice in an independent manner free from political interference or abuse.

As Mayor of Little Rock and as a member of Little Rock's City Board, I worked with others to open up doors which had previously been closed to women and minorities on boards and commissions and in city management positions. I am very proud of having played some role, however small, in bringing in to city government such fine individuals as Mahlon Martin, Little Rock's first African-American City Manager, Susan Fleming, Little Rock's first woman City Manager, James Rogers, Little Rock's Airport Manager, and many others. One of the gratifying things about going through the confirmation process is being reminded of the many wonderful people who have touched my life over the years. The letters this Committee and I have received in support of my nomination have strengthened my resolve and warmed my heart.

These individuals and many others have been so generous and supportive in the past few weeks; they will never know how grateful I am. I only hope that, if I am confirmed, I will make them proud of me and proud of the Justice Department of which I hope to be a part: a Justice Department which will continue to open doors through vigorous enforcement of the civil rights laws of this country; a Department which will do all that it can to protect the environment by enforcement of its laws; a Department which will reinvigorate antitrust enforcement to promote competition and protect consumers; and a Department with Janet Reno and Phil Heymann at the helm which will make major strides in making our communities and our children safe.

Senators, as a trial lawyer and as a member of the Arkansas Supreme Court, I have loved the law. When I undertook public service assignments as mayor, on the City Board, or on the Ethics Commission, I still practiced law. I now face the exciting, challenging opportunity to merge my love of the law with public service.

Attorney General Reno has said to me and others who work with her what she has said publicly: there is one threshold question at the Justice Department: what is the right thing to do? If confirmed by the Senate, I can think of no greater honor than to be able to work beside Janet Reno to try to do the right thing for our citizens and the causes of justice and equality.

Thank you, Mr. Chairman. I look forward to your questions.

**The CHAIRMAN.** The hearing is adjourned.

[Whereupon, at 2:09 p.m., the committee was adjourned.]

[Submissions for the record follow:]



SUBMISSIONS FOR THE RECORD



Arkansas State Conference  
National Association for the Advancement of Colored People  
P.O. Box 184468  
Little Rock, Arkansas 72218

May 12, 1993

Rev. Ellihue Gaylord, Sr.  
President

The Honorable President Bill Clinton  
President of The United States of America  
The White House  
Washington, D.C. 20500

Ken Smith  
First Vice President

Dear President Clinton:

Elbert Smith  
Second Vice President

We Strongly recommend Attorney Webster Hubble for  
Assistant Attorney General.

H.O. Gray  
Third Vice President

The job that Mr. Hubble has done in Little Rock,  
should truly qualify him with the position. Having  
Mr. Hubble on the board will strengthen the office.

Velma George  
Secretary

Omota Jewell  
Treasurer

Sincerely,

S.E. Holdbrooks  
Parliamentarian

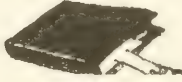
*Ellihue Gaylord, Sr.*  
Ellihue Gaylord, Sr.  
State NAACP President



STATE ADDRESS  
P.O. Box 164089  
Little Rock, AR 72216

# CHURCH OF GOD IN CHRIST

FIRST JURISDICTION OF ARKANSAS  
OFFICE OF  
BISHOP L.T. WALKER



P. 6  
RESIDENCE  
2315 Chester Street  
Little Rock, Arkansas  
Phone 375-5804

May 12, 1993

Senator Joe Biden  
Chairman Senate Judiciary Committee  
221 Senate Russell Bldg.  
Washington D.C. 20510

RE: Confirmation of Webb Hubbell

The Honorable Senator Biden,

I am writing this letter to show my support for Mr. Hubbell. Senator I serve as a Bishop in the Church of God In Christ, with a membership of 4,000,000 plus predominantly BLACK. I was very instrumental in getting Bishop L.H. Ford who is the Presiding Bishop of our church to and the entire membership to endorse President Clinton.

Once again the moment has arrived for us to come to the aide of one of our own; Webb Hubbell has served the State of Arkansas well. The membership At the Little Rock Country Club which is in question should not influence the committee. Webb Hubbell is not prejudice not is he a racist. Webb Hubbell will make one of America's finest Associate Attorney Generals

He has worked to actively recruit minority members. This man has never discriminated against anyone. As the former mayor of Little Rock he worked with the Black community and was very instrumental in placing Blacks in some key positions. The communities were well represented under his leadership and every citizen treated the same.

PLEASE DO NOT ALLOW THE COMMITTEE TO FIT JOSEPH COAT UPON HIM FOR THIS INCIDENT; IF THEY DO THEY WILL KILL HIM. AS JESUS SAID AT THE GRAVE OF LAZARUS "LOOSE THE MAN AND LET HIM GO".

I Bishop L.T. Walker stand behind Webb Hubbell 100%.

Yours for the Master's Service,  
*Bishop L.T. Walker*  
Bishop L. T. Walker

## HOLLINGSWORTH LAW FIRM, P.A.

ATTORNEYS AT LAW  
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LITTLE ROCK, ARKANSAS 72201

P. A. HOLLINGSWORTH  
AMANDA H. HYATT

TEL. (501) 374-3420  
FAX. (501) 372-6550

May 12, 1993

Honorable Joseph R. Biden, Jr.  
Chairman  
Senate Judiciary Committee  
224 Dirksen Senate Office Bldg.  
Washington, DC 20510-6275

Dear Senator Biden:

I am an attorney in Little Rock, and during the last twenty five or so years have been very active in the legal community in Arkansas. During that period I have been involved on many cases and community projects with Webster L. Hubbell, who is under consideration for an appointment to the United States Department of Justice.

I am also aware your committee will be holding confirmation hearings on Mr. Hubbell in the near future, and I wanted to share my feelings on his nomination.

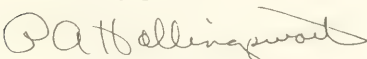
Mr. Hubbell is highly respected in the legal community and has made many positive contributions not only as a lawyer, but also during his time as a public servant. He is a respected community leader and has always shown extraordinary qualities of leadership.

This leadership ability has also been exhibited by his commitment to civil rights and the advancement of the notion of fair play. In 1984 Mr. Hubbell and I were appointed to the Arkansas Supreme Court, by then Governor Clinton, to fill unexpired terms on that court. He served as Chief Justice. During that year, as it has been through the years I have known him, we worked together on cases that were very meaningful and challenging to me. I genuinely appreciated the opportunity and honor of serving with him.

I am very pleased to have the opportunity to write to you and your committee, and encourage that Mr. Hubbell's nomination be confirmed by the Senate. I am sure this nation will benefit greatly from his service, as we in Arkansas have during the last twenty years.

Please feel free to call me if I may be of any assistance to you or your committee.

Sincerely yours,



P. A. Hollingsworth

PAH/dw



# Mays & Crutcher

LA W OFFICES

Richard L. Mays  
 Zimmerly Crutcher, Jr.  
 Arkie Byrd

415 Main Street  
 Little Rock, Arkansas 72201  
 (501) 372-6303  
 FAX (501) 372-6550

May 12, 1993

VIA EXPRESS MAIL

Senator Joseph R. Biden, Jr.  
 Chairman  
 Senate Judiciary Committee  
 SD-244 Dirksen Senate Office Building  
 Washington, DC 20510-6275

Dear Chairman Biden:

I am writing to you because of my concerns about recent newspaper articles that I have read questioning Associate Attorney General-nominee Webster Hubbell's commitment to equal opportunity.

I have known Webb personally for approximately 20 years. I first met him early in my legal career and became a friend of his during my career as an Arkansas state legislator and later as Associate Justice of the Arkansas Supreme Court. I can state unequivocally that Webb Hubbell is extremely sensitive to the rights of African Americans and all other minorities.

Any attempt to portray Mr. Hubbell otherwise is a canard.

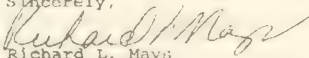
During the course of our friendship, Webb and I have had private, philosophical discussions about race relations. Based on these discussions, and Webb's actions during his own career as Mayor of Little Rock and as Chief Justice of the Arkansas Supreme Court, I can tell you that he is a sensitive, tolerant man. He has a deep understanding of the hurdles that minorities have traditionally faced in America. Indeed, Webb brings a range of experiences and perspectives to the Department of Justice that will only help strengthen America's commitment to equal opportunity.

As a personal friend of Webb, I am particularly pained by the possibility of the media and political adversaries distorting a man's true character. As an African American, I strongly question whether an issue that is dear to me is being used to undermine a good and decent man for political ends rather than in a good faith effort to evaluate a public servant.

Mr. Chairman, I hope that you and the other members of the Senate Judiciary Committee will carefully consider my views during your consideration of Mr. Hubbell's nomination.

Thank you for your attention to this important matter.

Sincerely,

  
 Richard L. Mays

FELLER FOUNDATION

kansas 72202 - 3999

501/376-6854  
FAX 501/374-4797

May 12, 1993

Senate Judiciary Committee  
United States Senate  
Capitol Hill  
Washington, D.C.

Honorable Members:

Having just finished reading one of many articles questioning the appropriateness of Attorney Webb Hubbell's nomination as Associate Attorney General in the United States Department of Justice, I felt compelled to provide you with some information that has evidently been overlooked by the media and is relevant to the ongoing debate.

I am not a member of the Country Club of Little Rock but I am personally aware of Mr. Hubbell's interest in attracting minority members for club membership dating back a number of years.

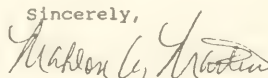
I had the privilege of serving as the first black city manager of the City of Little Rock from 1980 through early 1983 during a time when Mr. Hubbell served on the Board of Directors of the City. At the time of my selection, Webb Hubbell was Mayor and personally convinced me to apply for the position. As you might expect, I had serious doubts as to whether or not the City of Little Rock was prepared to employ a black city manager. It was primarily Webb Hubbell who convinced me that my candidacy would be a serious one. I have no doubt that he played a significant role in my selection.

While working with him as both Mayor and board member, I never had the occasion to doubt his commitment to equity and equality. On numerous occasions, I witnessed him confront issues of inequity, both around race and gender. I have had the privilege, although not on a routine basis, of continuing contact with him over the past decade and can assure you I maintain my opinion regarding his commitment.

I would sincerely hope this bit of information will cause you to consider the broader issue of equity and equality and Mr. Hubbell's proven commitment to both. Should you desire to discuss this letter or my relationship with Mr. Hubbell, please don't hesitate to contact me.

Thank you for your time and consideration.

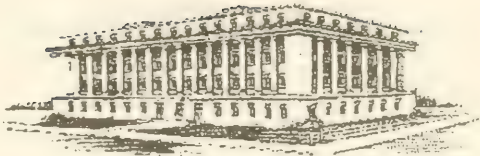
Sincerely,



Mahlon A. Martin  
President

GEORGE VAN BOCK, JR.  
Municipal Judge

CALVIN LEVARTY  
Court Administrator  
and Probation Officer



HARRY JO WARREN  
Municipal Clerk

PAULA E. HENDERSON  
Chief Deputy Clerk

UNION COUNTY MUNICIPAL COURT  
UNION COUNTY COURTHOUSE  
SECOND FLOOR  
EL DORADO, ARKANSAS 71730

May 12, 1993

The Honorable Joseph Biden, Jr.  
221 Senate Russell Building  
Washington, D.C.

Re: Webb Hubbell

Dear Sir:

I have known Webb Hubbell since 1970, when he and I attended the University of Arkansas School of Law in Fayetteville, Arkansas.

As an African American attending law school there was a lot of bigotry, but Webb was a friend not only to me but to other African American law students. He was someone you could always talk to, and he would help you in anyway he could.

In all the years, I have known Webb, I've never heard him nor heard of him making an ethnic or racial slur or statement.

He was an excellent student, is an excellent attorney, and would make an exemplary Deputy United States Attorney General.

Respectfully,

George Van Bock, Jr.  
Municipal Judge

GVB/peh



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TELEPHONE 801-376-201

FAX NO. 601-378-2147

May 13, 1993

[illegible][illegible]

WILLIAM J. SMITH  
WILLIAM A. CLOUTIER, JR., P.A.  
W. C. CLARK  
WILLIAM L. TIGHE  
WILLIAM L. PATTON, JR., P.A.

(601) 270-1681

FAX - 202-863-8081

Senator Joe Biden, Jr.  
Chair, Senate Judiciary Committee  
221 Senate Russell Building  
Washington, D.C. 20510

Dear Senator Biden:

Webb Hubbell is an outstanding citizen of Little Rock, Arkansas and I have always known him to be fairminded and a strong advocate for minority rights. He is a man of great stature, leadership and outstanding legal talent.

Please accept this letter as evidence of my strong support for Webb Hubbell's confirmation to a senior position in the Justice Department where I am confident he will be a tremendous credit to that Department and the people of this country.

Sincerely,

Meredith P. Catlett

MPC / bp

Lottie H. Shackelford

May 13, 1993

The Honorable Joseph R. Biden, Jr.  
Chairman  
Senate Judiciary Committee  
224 Dirksen Senate Office Bldg.  
Washington, D.C. 20510-6275

Dear Senator Biden:

A few weeks ago, Webster "Web" Hubbell was nominated to the position of Associate Attorney General, Department of Justice.

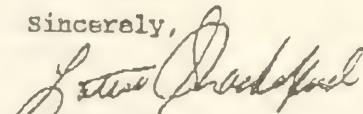
I am writing to let you know of my strong support of Mr. Hubbell for this position. I am a former Mayor of Little Rock, Arkansas, and I had the opportunity of serving on Little Rock's City Board of Directors with Web for approximately five years.

Web was a very progressive board member and mayor of our city. His decisions were always influenced by his concern for fairness. He was committed to public service and worked very hard to earn the people's trust as an elected official.

Web served the citizens of Little Rock and Arkansas with integrity and honor. I know that he will be just as diligent in his efforts to be fair, honest and compassionate in the Department of Justice.

I wholeheartedly endorse his nomination and offer my support for confirmation of Webster Hubbell as Associate Attorney General.

Sincerely,



Lottie H. Shackelford

1720 Abigail Street  
Little Rock, AR 72204



# MARION A. HUMPHREY

Circuit Judge  
Sixth Judicial District, First Division  
Pulaski and Perry Counties  
Pulaski County Courthouse, Room 407  
401 West Main Street  
Little Rock, Arkansas 72201  
Phone (501) 372-8590

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Secretary

May 13, 1993

The Honorable Joseph R. Biden, Jr.  
221 Russell Building  
United States Senate  
Washington, D. C. 20510

Dear Senator Biden:

This letter is written in reference to the nomination of Webb Hubbell as Associate Attorney General of the United States.

Mr. Hubbell has a distinguished record of public service here in Arkansas, having served as Mayor of Little Rock and Chief Justice of the Arkansas Supreme Court. He possesses character, intellect and an abiding sense of fairness.

As an African American, I believe that Mr. Hubbell is committed firmly to the principle of equal justice under law for all people.

I believe further that his confirmation would well serve the administration of justice in this country.

Sincerely yours,

Marion A. Humphrey  
Circuit Judge

MAH/and



# STATE PRESS

May 13, 1993

Senator Joseph Biden  
221 Senate Russell Building  
Washington, D.C. 20510

Dear Senator Biden,

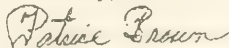
This letter is in support of Webb Hubble. He has shown tremendous commitment and leadership in the community and would serve our nation well in a federal position.

Mr. Hubble, a partner with the Rose Law Firm, has served as an Arkansas supreme court justice, city director and has been an all-American football star while on the University of Arkansas-Fayetteville Razorback team.

The *Arkansas State Press* is the oldest minority owned and operated newspaper in the state. It gained national recognition under the leadership of Daisy Bates during the fight for civil rights. Our long term coverage of community events allows us the privilege of recognizing outstanding community leaders. Mr. Hubble is one of those outstanding leaders.

The *State Press* is proud to recommend Mr. Hubble for a federal post. The nation will benefit tremendously.

Sincerely,



Patrice Brown  
Publisher

THE UNITED STATES TRADE REPRESENTATIVE  
Executive Office of the President  
Washington, D.C. 20506

May 13, 1993

The Honorable Joseph R. Biden  
Chairman, Committee on the Judiciary  
United States Senate  
Washington, DC 20510

Re: The nomination and confirmation of Webster Hubbell to be  
Associate Attorney General

Dear Mr. Chairman:

I am writing this letter in support of my good friend Webb Hubbell. It is unfortunate that questions have been raised about his membership in, and his recruiting efforts for the Country Club of Little Rock (CCLR).

Webb's public display of interest in equality of opportunity for all citizens of Little Rock dates back to, at least, the 1970's. As an example, Webb was the person responsible for Mahlon Martin becoming the first African American to serve as City Manager of Little Rock. From that position, and always with Webb's active support, Mahlon has gone on to a distinguished career in and out of government. He was the Director of the Arkansas Department of Finance and Administration from 1983-1990; and is currently President of the Winthrop Rockefeller Foundation. This is but one example, but an example that accurately shows the character and the commitment of Webb.

My relationship with Webb dates back to 1986. I believe I first met Webb at a function hosted by the Arkansas Arts Center. [I, and my family, moved to Little Rock in 1984.] I do recall that during our first meeting he welcomed me back to Little Rock, offered his assistance to help me if the need ever arose, told me how pleased he was that I was living in Little Rock, and he hoped that I would become an active citizen to help make Little Rock an even better place to live. Our relationship since that time has clearly demonstrated the genuineness and the sincerity of his earlier comments.

There were times when Webb specifically inquired about my interests in golf, and tennis. Given the tone and the way in which he made those comments led me to believe, on more than one occasion, that he was about to shift the discussion to my interest in becoming a member of the CCLR. But I would purposely redirect the conversation. My reasons for not wanting to be considered for membership at the CCLR at that time were: (1) I did not know the community and I did not believe that the community knew me well enough to feel as comfortable around me and my family as I would have liked; (2) I do not like publicity and being the first minority to become a member of CCLR would be a major news event -- as it turned out I was correct, and (3) I wanted all of the club's members to feel as though the decision by me, and by those members that would recommend me, had been thoughtful and had been done in a way that clearly respected the tradition of accepting new members.

In the Spring of 1991 I agreed to allow my name to be submitted for membership. When Webb learned of my decision, he clearly was

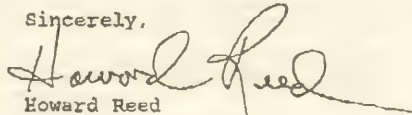
very pleased, sure that I and my family would really enjoy our membership, and certain that I and my family would be welcomed enthusiastically by all.

It should also be noted that I, my family, and many other non-members of CCLR have visited the Club, as guests of members, for many years prior to my becoming a member; I have always experienced only the most gracious hospitality.

I wholeheartedly and without any reservations whatever, support Webb's nomination to be Associate Attorney General. Webb is a valued friend, and I know of no reason why he should not receive the unanimous recommendation of the Committee and the unanimous vote of the full Senate approving his nomination.

Thank you for allowing me the privilege and honor of recommending Webster Hubbell. If I can be of further assistance, please let me know.

Sincerely,

A handwritten signature in dark ink, appearing to read "Howard Reed". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Howard Reed  
Special Counsel for  
Finance and Investment Policy



## WILLIAMS &amp; ANDERSON

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111 CENTER STREET  
LITTLE ROCK, ARKANSAS 72201

W. JACKSON WILLIAMS

(501) 372-0800

TELECOMPAR  
(501) 372-6453

May 13, 1993

Honorable Joseph R. Biden, Jr.  
Chairman, Senate Judiciary Committee  
Room 224, Dirksen Senate Office Building  
Washington, D.C. 20510-6275

Re: Mr. Webster Hubbell

Dear Senator Biden:

I am aware that Mr. Webster Hubbell's appointment as Associate Attorney General of the United States is presently before the Senate Judiciary Committee for its consideration.

Recently there have been numerous press reports concerning Mr. Hubbell, the Country Club of Little Rock, its policies and Mr. Hubbell's part in this entire matter.

I was President of the Board of Governors of the Country Club of Little Rock during the years 1991 and 1992 when the application of Mr. Curt Reed was first made to the Club, and when the Board of Governors considered and favorably acted on Mr. Reed's application.

Some time previous to Mr. Reed's application, Mr. Hubbell, who is a friend of mine, communicated to me his belief that the Club needed to consider the admission of members of our black community into the Club. Mr. Hubbell was not alone in this point of view, as there were others who expressed similar sentiments to me, all of which had the effect of encouraging the Board to ultimately consider this matter favorably. When Mr. Reed's application became known to the membership generally, Mr. Hubbell again approached me on several occasions to urge the Board's favorable consideration to Mr. Reed's application. He also told me he was going to express his views to other members of the Board, and I know as a fact that he did in fact communicate similar views to other Board members.

Mr. Reed's application was known to the Board before the incident of President Clinton's well publicized round of golf at the Club in March of 1992. The period of time from Mr. Reed's application to admission to membership followed the normal application procedure and period of time for acceptance into the membership of the Club and, in my view, with the same outcome, regardless of the Clinton candidacy.

Mr. Hubbell's views expressed to me and to other board members were helpful in the favorable consideration of this entire matter. I have known Webb since he started practicing law in Little Rock and his conduct here was entirely consistent with his character, integrity and his sensitive consideration of his fellow man.

If there is anything further I can elaborate on the record relevant to your consideration of Mr. Hubbell's qualifications for the office upon which the President has appointed him, I shall be glad to do so.

Sincerely,

  
W. Jackson Williams

Charles Bussey

1860 South Izard  
Little Rock, Arkansas 72206

May 14, 1993

The Honorable Joseph R. Biden, Jr.  
Attn: Mark Schwartz  
United States Senate  
Washington, D. C. 20510

Dear Senator Braun:

I am writing you concerning the approaching confirmation hearing for Webster L. Hubbell. I have read with much dismay the derogatory remarks and characterizations manufactured by envious and jealous people about the life of a man they do not know.

I can not identify with the fervor surrounding the Country Club of Little Rock not having a black member or measuring the validity of a man's ethnic character by his association in an organization that does not have a black member. To join or refuse to join on the basis of the presence of or lack of racial mixture, or to make an issue of such, is, in and of itself, reactionary and racist. There are other issues before our people of all colors which are more provocative and threatening than this - - issues more important than all the country clubs in the country. One of those issues looms on the horizon in the possibility of losing the service to this country of great man, Webster L. Hubbell.

I speak to you not solely as a black man, but as a black member of the community which Webb Hubbell for so many years unselfishly and tirelessly gave of himself to better. I am not just a boy in the streets as are some of his detractors and others who write for publication. My list of public service spans 42 years, as a member of the Board of Directors of St. Vincent Hospital, past President of the American Lung Association, Board member of the Boy Scouts, Trustee of Mt. Zion Baptist Church, past Executive Board member of the March of Dimes both here in Little Rock and in New York, and the first black from Arkansas to be on the Board of the National League of Cities. The list of service goes on and has touched many lives at all levels, and the cornerstone of that service evolves around the opportunity and support afforded me by a person who sought to better his community and another person's life. That person is Webb Hubbell. It was at his urging that I was nominated to run for Mayor of Little Rock, and his continued support saw that dream come to pass. I would not have been Mayor of Little Rock had it not been for Webb Hubbell. His support benefited me, our community and this city more than would his sponsoring me for membership into a country club. He did not sponsor me to become a member in the Country Club because he knew I would not participate in any country club, be it white, black or integrated. The people of all races and financial situations are my country club and Webb Hubbell is a member of that club as well.

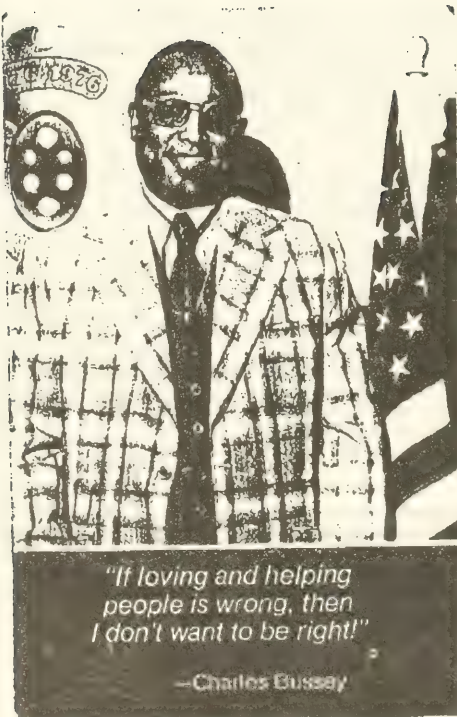
I set a goal for myself some number of years ago to make my mark by being the first black man in Arkansas to accomplish a number of things. Among them were being the first black Deputy Sheriff, first black member of the Little Rock City Board of Directors, and the first black Mayor of Little Rock. I also wanted to be the first black to ride in the Livestock Show Rodeo procession through downtown Little Rock. Webb Hubbell was instrumental in making that happen, right down to arranging for the use of a horse. This is not the act of a self-centered, ego driven man.

Webb Hubbell is fair and honest. I have never known him to lie on behalf of anyone, much less to benefit himself. This blood letting in the name of security is a feeble attempt by those who fear change to manufacture something which simply is not there, and I ask that you do whatever you can to help. This is a man concerned of others over himself; one who gives to others over himself or his family because he sees the need to return to the community some of what he has gained from that community.

Regardless of the attacks, they will not change his soul, and those of us who know the man and should speak of him know his soul and what he is. If his nomination is blocked, the nation will lose a valuable asset to the country and its people. He will not, however, speak ill of the process and will support the system. This great man has always been there when his community and friends called out in need. We must now be there for him.

Very truly yours,

*Charles Bussey*  
Charles Bussey







## Democratic National Committee

May 14, 1993

The Honorable Joseph R. Biden, Jr.  
221 Senate Russell Building  
United States Senate  
Washington, DC 20510

Dear Senator Biden:

I am writing this letter in support of the nomination of Webb Hubbell as Associate Attorney General of the United States. I have known Webb since 1971, when we attended the University of Arkansas School of Law in Fayetteville, Arkansas.

During the time we were in law school, Webb always went out of his way to make sure that African Americans were not excluded from the various activities at the school. He was well liked and respected by the African Americans students on campus.

Webb has always appreciated and understood the African American community and respected the concerns of those individuals who reside within that community.

He is an excellent attorney, and would make a great Associate Attorney General.

Sincerely,

Carol Willis  
Director of Voter Registration  
and Participation

430 South Capitol Street, S.E. Washington, D.C. 20003 (202) 863-8000

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 Gastroenterology  
 Philip R. Bowden, M.D.



An Outpatient Surgery Center

May 14, 1993

Senator Joseph Biden, Chairman  
 Senate Judiciary Committee  
 Capitol Hill  
 Washington, DC

RE: Webb Hubbell

Dear Senator Biden:

I am writing this letter of support for Webb Hubbell in his nomination for Assistant Attorney General. I have known Webb for several years and have always found him to be an honest, fair, and open-minded individual. He has always advocated racial equality and I have never questioned his commitment to equality. I am also aware of his efforts to recruit African-Americans to the Country Club of Little Rock. In fact, I have been approached numerous times, as well as many of my friends who are African-American.

I am enclosing an article that appeared in our local paper, the ARKANSAS DEMOCRAT-GAZETTE to further shed light on this matter. I want it understood that I totally support Webb's nomination without hesitation as I know other African-Americans in this state do.

I appreciate the opportunity to address this matter.

Alonzo D. Williams, M.D.

ADW/pg

Enclosure

CC: Senator Howard Mottzenbaum  
 President Bill Clinton  
 Democratic Nat'l Committee

# Blacks say Hubbell made effort to break club's color barrier

BY JAKE SANDLIN  
Democrat-Gazette Staff Writer

Just who Webb Hubbell did and didn't talk to about breaking the Country Club of Little Rock's color barrier became more defined Thursday in interviews with several prominent men who are black.

Former Little Rock City Manager Mahlon Martin and Bedford Collins, former deputy director of the state Department of Human Services, said Hubbell spoke with them years ago in an effort to recruit blacks into the club.

Hubbell, nominated as associate attorney general, is being percolated over his club membership.

He faces a Senate confirmation hearing next week.

In December, economist Howard Curtis Reed became the club's first black member. Hubbell has said he has tried to recruit blacks into the club since 1988.

Martin said he has sent a letter to the Senate Judiciary Committee about Hubbell and the country club matter. Martin became Little Rock's first black city manager in 1980, while Hubbell was mayor.

"I have had discussions with Webb about the country club," Martin said of Hubbell's "interest and desire to recruit" minorities. He said those discussions occurred since Martin became president of the Winthrop Rockefeller Foundation in 1989.

"I did have some discussions about the Little Rock Country Club with Webb and some other people who, for a number of years, were asking about people who might be interested and how something could happen to break down that barrier," said Collins, now a lobbyist for the Weyerhaeuser Co. in Hot Springs.

"They were actually soliciting me for names of other people," he recalled.

Dr. Alonzo Williams, a Little Rock physician and state Medical Board member, and Les Hollingsworth, a Little Rock lawyer who was a state Supreme Court justice with Hubbell in 1984, also mentioned previous club efforts to solicit blacks.

"It's amazing to me that the issue of racial discrimination has come up in regard to Webb Hubbell," Williams said. "I've always known him to be fair."

Williams added he has a standing invitation from another member to join. He has been accepted at Chenal Country Club, he said, but has not joined. Chenal has had black members since it opened in

mid-1990.

"I think that Webb is the type of person who would try to convince people of any institution that he belonged to that it should be open and fair," said Hollingsworth, a charter member of the Chenal club. "I think he is a fair person and committed to civil rights."

*'It's amazing to me that the issue of racial discrimination has come up in regard to Webb Hubbell.' — Dr. Alonzo Williams*

Martin also said he had seen Hubbell display strong feelings in favor of racial equality and "never had reason to question his commitment to equity."

Martin, Williams and

Hollingsworth all said Hubbell never directly asked them to join.

Among those who said they have not been asked to join Hubbell's club were:

- Charles Stewart, First Commercial Bank senior vice president, also a charter member of the Chenal club.

- Dr. Raymond Miller, a Little Rock physician and board member for Arkansas Power & Light Co. and Worthen Banking Corp., a Chenal "social member."

Wall Patterson, president of Health Care Training Corp. in Little Rock and a former DHS director, became the first black to join Pleasant Valley Country Club in December. Patterson was away on business Thursday, his office said, and unavailable for comment.

(Terry Lanning of the Democrat-Gazette's Washington bureau contributed to this article).

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 TELEPHONE: 501-375-0400  
 TELEFAX: 501-372-3482

May 14, 1993

VIA FACSIMILE AND REGULAR MAIL

The Honorable Joseph R. Biden, Jr.  
 Chairman  
 Committee on the Judiciary  
 United States Senate  
 Washington, D. C. 20510

Dear Mr. Chairman:

This is in regard to Webb Hubbell and his nomination hearing before your committee.

Webb has been my friend for years. I know him to be a person of unimpeachable integrity and a person without a bigoted bone in his body. I too am a member of the Country Club of Little Rock. On at least two occasions I specifically remember having discussions with Webb about the importance of integrating the Country Club. It was very clear to me from these discussions that Webb was very interested in seeing blacks put up and admitted to membership in the Country Club of Little Rock. I respectfully submit to you that Webb Hubbell will make an outstanding Assistant Attorney General for our country.

Webb has consistently been aggressive in furthering the civil rights of all persons. He has been a leader in Little Rock for a long time and has always treated all people in a fair and equal manner. It is my hope that this letter will help in your deliberations next week.

Kind regards,

Henry Hodges

HH:ah



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May 14, 1993

The Honorable Joseph R. Biden, Jr.  
221 Senate Russell Building  
United States Senate  
Washington, DC 20510

Dear Senator Biden:

We strongly recommend Attorney Webster Hubbell for Associate Attorney General.

Mr. Hubbell has been a leader in Arkansas and has shown a tremendous commitment to the community.

He is an excellent nominee for the position and will serve our nation well.

Sincerely,

Natalie Willis  
Vice President

**SUSAN B. FLEMING**  
**110 CENTER STREET, SUITE 2300**  
**LITTLE ROCK, ARKANSAS 72201**  
**(501) 377-2428 / FAX 377-3465**

May 14, 1993

The Honorable Joseph R. Biden, Jr.  
 United States Senate  
 Washington, D C 20510

RE: Nomination of Webster Hubbell  
 as Associate Attorney General

Dear Senator Biden:

It is my pleasure to write in support of Webster Hubbell's nomination to the position of Associate Attorney General. In 1978 I was an assistant in the City Manager's Office, when Webb Hubbell began serving on Little Rock's governing body, the Board of Directors. In all my years in government service, I never knew anyone more dedicated to the belief that the role of government is to serve all people equitably. His public service has been marked by a deep, abiding concern for all people in all areas of Little Rock and Arkansas. In his public, professional and private life, Webb Hubbell is a person of unimpeachable integrity, extraordinary ability and unfailing charm and courtesy.

While Webb served as Mayor of Little Rock, Mahlon Martin, Little Rock's first African-American City Manager, was selected. In 1983 when Mr. Martin resigned to accept a Cabinet position with then-Governor Bill Clinton, Webb was among the first to encourage me to seek the job. With his strong support, I was selected Little Rock's youngest, first female--and most assuredly the City's first pregnant--City Manager. During my tenure as City Manager, Webb Hubbell was always available to provide advice and counsel, support and encouragement. Whatever the issue, his first concern was to do what was right.

Webb resigned from the City Board of Directors to serve as Chief Justice of the Arkansas Supreme Court. His move was the City's loss. Webb Hubbell has served his City and his State with extraordinary distinction. He is uniquely qualified by virtue of his experience, his lifelong commitment to principle and his very special abilities to assume a leadership role within the Department of Justice. It is without reservation that I encourage you and your peers to confirm his nomination.

Sincerely,

*Susan B. Fleming*  
 Susan B. Fleming





Representative  
**BEN MCGEE**  
 P. O. BOX 240  
 MARION, ARKANSAS 72354-0240

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 Part of Crittenden County

STATE OF ARKANSAS

*House of Representatives*

**COMMITTEES**

Public Transportation  
 State Agencies and  
 Governmental Affairs  
 Joint Committee on  
 Children and Youth

Senator Joseph Biden  
 Chairman of Senate Judiciary Committee  
 224 Dirksen Bldg.  
 Washington, D.C. 20510

Dear Senator Biden:

As a member of the Arkansas Legislative Black Caucus, it is with unreserved conviction that I support the nomination and appointment of attorney Webb Hubbell for Associate Attorney General.

Webb Hubbell meets the high standards that your august body demands of a public servant, his public record of fairness and integrity in the pursuit of justice is universally acknowledged.

We'd be remiss in the fullest sense, however, if your body failed to recognize the more private acts of Webb Hubbell that confirm his own high standards of social equality. My specific reference is to his conscientious attempts to secure the admission of Blacks to membership in the Little Rock Country Club, an organization historically in contempt of open admission to all who qualify.

For the several years that Webb Hubbell was a member of that body, he sought radical changes in their philosophy and social practice. He was a champion of change while working within the rigid structure of that organization. As an example, he recruited and sponsored the club's only black member, Mr. Howard Curtis Reed.

I'm convinced that ultimately, you will cast your vote and support Webb Hubbell on the basis of his experience, scholarship and high standards of jurisprudence.

A vote for the support of Webb Hubbell will be a significant contribution to the federal judiciary's legacy of fairness and institutional integrity.

Sincerely,

*Ben McGee*  
 Ben McGee



City of Little Rock

• Administration

Department of General Services

May 17, 1993

Honorable Joseph R. Biden, Jr.  
United States Senate  
Washington, D. C. 20510

Re: Mr. Webb Hubbell's Confirmation as Associate Attorney General

Dear Senator Biden:

I am an African American employed by the City of Little Rock as the Director of the Department of General Services. On May 1 of this year, I celebrated my 24th year of employment with the city as a department head. Fifteen of those years I served as Director of the Department of Human Resources, with the responsibility to oversee an array of federal programs. This type of job is quite common for blacks to hold in many southern cities because it does not deal with general fund monies and there is no city-wide responsibility.

In late 1983, the position of Director of General Services became available. The City Manager considered combining Human Resources and General Services into one Department and making me the director. Although, Webb Hubbell who was serving on the City Council at the time did not think of the idea, he supported it and encouraged the City Manager to follow through with her idea. On January 9, 1984, I was promoted to the position, becoming the first African American Department Head with city-wide responsibilities.

Some of my major responsibilities include the following:

- The 911 Center which includes dispatching for police and fire
- The City Garage with over 1000 vehicles
- Building Maintenance and New Construction
- The Office of Emergency Services of which I am the Director

As a councilmember, Webb Hubbell could have blocked my appointment, but he didn't. Does this sound like a man who is insensitive to minority problems? By the way, he led the way for the appointment of the first woman as City Manager of Little Rock.

When Webb appears before your committee this week, you will get a chance to know for yourself that Webb Hubbell is worthy to hold the position of Associate Attorney General and will do our country proud.

Sincerely,

*N. W. Hill*

Nathaniel W. Hill, Director

LITTLE ROCK MUNICIPAL AIRPORT COMMISSION

#1 AIRPORT DRIVE  
LITTLE ROCK, ARKANSAS 72203



May 17, 1993

Honorable Joseph Biden  
Chairman, Senate Judiciary Committee  
United State Senate  
Washington, D.C. 20510

Dear Chairman Biden:

It is an honor to have the opportunity to support the appointment of Mr. Webster L. Hubbell as Associate Attorney General of the United States.

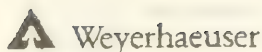
I have known Webb personally and professionally for several years. He has continuously demonstrated a genuine concern for people and their problems from all walks of life and has availed himself to assist them in any manner possible. He certainly has devoted himself to the advancement of justice to all segments of the community.

Thanks again for this opportunity and if I can be of additional assistance, please notify me.

Sincerely

James R. Rodgers,  
Airport Manager





P.O. Box 1040  
Van Springs, Arkansas 71962

May 17, 1993

The Honorable Joseph R. Biden, Jr.  
Chairman Senate Judiciary Committee  
224 Dirksen Senate Office Building  
Washington, D.C. 20510-6275

Dear Chairman Biden:

During the past few weeks I have watched with great interest the discussions surrounding the nomination of Webster (Webb) Hubbell to be Associate Attorney General. I am writing to share my view of Webb, his membership at the Country Club of Little Rock and his efforts to change things.

Webb Hubbell has demonstrated by his actions and service to the city where I formerly lived (Little Rock), our state and our nation a sensitivity to the concerns of African-Americans. Webb has been inclusive in his business and social endeavors. Webb's membership at the Country Club of Little Rock is not unusual for a person of his stature in the community. It is my view that his membership and his efforts, along with the efforts of others, has lead to the nomination and election of an African-American to membership in the Club. Without the leadership shown by Webb and others that election would not have taken place. The Club does not recruit, but Webb and others began an effort in the 1980's to find applicants that would allow their names to be submitted for membership. It has not been an easy undertaking. It would have been easy to accept the status-quo.

It is my view that individuals of Webb Hubbell's character should be members of organizations like the County Club of Little Rock because it is only from the inside that meaningful efforts and change can be made. It is easy to criticize and conjure up images of a South that no longer exist. To subject Webb to that kind of verbosity is very unfair and serves only to keep like-minded people from stepping forward to risk the consternation that Webb and others could face for their efforts. Rather than being a help, the discussions around the Country Club of Little Rock have probably set efforts back significantly. It is comforting to know that men the caliber of Webb are members and are committed to the Club having some diversity.

The Honorable Biden  
May 17, 1993  
Page Two.

Senator Biden, there may be some reason members of the Judiciary Committee believe Webb should not be confirmed. Let me assure you that sensitivity to African-Americans and other diverse culture and social interests should not be one of them. I urge you, and members of the Committee, to recommend to the full Senate the nomination of Webster Hubbell as Associate Attorney General.

Sincerely,

Thedford Collins  
Manager, Government Affairs  
Arkansas

TC:ba

cc: The Honorable Dale Bumpers  
The Honorable David Pryor

**A. HENRY THOMAS, M.D.  
DOCTORS BUILDING  
900 SOUTH UNIVERSITY  
LITTLE ROCK, ARKANSAS 72205**

May 13, 1993

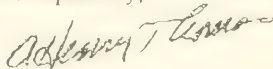
Senator Paul Simon  
462 Senate Dierksen Bldg.  
Washington, D.C. 20510

Dear Senator Simon:

I am writing in support of Webster Hubbell's nomination for Associate Attorney General. Webb and I have been close friends for many years and I know him to be intelligent, honest and hard working. I am certain that he will give a superb performance in this position.

Webb and I enjoy the game of golf and we frequently play at the Country Club of Little Rock which is quite close to our houses. This club, until recently, had no African American members although it never had an official policy of exclusion and did not discriminate on the basis of sex or religion. Since the late 1970's, Webb has frequently stated his belief that the club should take black members and he has discussed this with many members and in particular, those on the board. Membership in this club always takes years because of a long waiting list and because children of members take precedence over others who would like to join. Webb has used his influence on the other members to bring our first African American member into the club and he has stated for years that there should be several black families admitted. I am sure that this will happen because Webb (and others) have advocated real equality in club membership. This has occurred with a minimum of fanfare. If one assumes that the goal was to bring African Americans into complete membership in this club, it could not have been done more effectively. Webb played a crucial role in this small but important step to real equality in our community. He has been an advocate for advancement of equality for all our citizens and has been successful in this endeavor. If he had chosen a more confrontational tactic such as public resignation, he might not have been able to accomplish this purpose of extending membership to African Americans. He has suggested other minority families as possible members, and I feel he has moved this club in the right direction.

Yours respectfully,



A. Henry Thomas, M.D.



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Senator Paul Simon, Chairman  
 Senate Judiciary Committee  
 United States Senate  
 Washington, DC 20515

Dear Chairman Simon:

I write this letter in support of the confirmation of Webster Hubbell to his nominated position within the United States Department of Justice. I am disturbed by the misleading reports which I have read in the national and local news regarding Mr. Hubbell's activities associated with the Country Club of Little Rock.

I have known Mr. Hubbell since high school, attended law school with him, and have been a close social as well as professional acquaintance of his since we entered the practice of law almost 20 years ago. Frequently, I was his golfing companion and often spent time with him discussing matters pertaining to the Country Club of Little Rock.

I can testify without hesitation that Mr. Hubbell discussed with me and other members of the Country Club of Little Rock the need for the Country Club of Little Rock to recruit and admit minority members. We discussed efforts we could make to encourage minority members to become interested in making application to the Country Club of Little Rock.

These conversations, which were several, were initiated long before President Clinton announced his intention to run for President of the United States and obviously long before Mr. Hubbell had any thought that he would withdraw from his private life and enter public service.

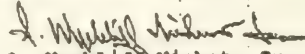
Senator Paul Simon, Chairman  
May 13, 1993  
Page -2-

Our conversations occurred periodically beginning in the early to mid 1980's and continued until he left for Washington. We were both pleased that Mr. Curtis Reed was admitted as the first black club member.

In closing, I would like to state that throughout my relationship with Mr. Hubbell, I have known him to be a consistent supporter of and advocate for civil rights. Any statement to the contrary is inaccurate; any innuendo to the contrary is unfair.

If I can provide you with any further clarification of my knowledge of the facts surrounding Mr. Hubbell's activities regarding minority recruitment efforts at the Country Club of Little Rock, please feel free to have one of your staff members contact me.

Respectfully yours,

  
A. Wyckliff Nisbet, Jr.

AWNjrmg

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May 13, 1993

The Honorable Paul Simon  
 United States Senate  
 Washington, D.C.

Dear Senator Simon:

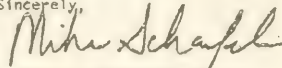
I am writing to you as Chairman of the Senate Judiciary Committee in support of my friend, Mr. Webb Hubbell. I have known Webb for almost thirty years and consider his word and reputation above reproach.

In my opinion, this latest episode over Webb's membership in The Country Club of Little Rock has not been accurately reported. I am sure that your Committee has been given ample information concerning The Club's policy for membership. Webb has attempted to bring the nondiscriminatory policy into reality. He and I have had several discussions about the need to have more black members in the Club. These discussions started as far back as 1987. There were times that I did not totally agree with some of his concerns, but Webb remained committed to trying to get black members in CCLR. Although he would never tell me who, he did tell me that he had asked some individuals of their interest in becoming members of the Club. Unfortunately, because of the membership cost and monthly fees and waiting list, it has been difficult to attract these members.

I am not sure if you are aware of some of the things Webb has done to promote blacks in our City. As a member of City Board, Webb was instrumental in the promotion of Mr. James Rodgers, a black, to the manager of the Little Rock Regional Airport. This was the highest position a black had held in our City. Later, Webb was very influential in the selection of Mr. Maylon Martin, a black, as our City Manager. Webb did this because he believed they were the best qualified individuals for the job. He would not let their color discriminate against them. I believe if Webb thought that CCLR would keep out anyone because of their color, he would resign.

It would be a shame to not allow the talents of this fine individual to help our Country, the way he has helped our City and State.

Sincerely,



Michael C. Schaefele, CPA

MCS:cm





Office of the Attorney General  
Washington, D. C. 20530

May 12, 1993

The Honorable Paul Simon  
United States Senate  
462 Dirksen Senate Office Building  
Washington, D.C. 20510-1302

Dear Senator Simon:

I enjoyed our recent visit. Because we did not have an opportunity to discuss fully the issue of country club membership when we met, I wanted to expand on our discussion, knowing that this issue is important to you. Several of the newspaper reports that have appeared regarding this matter are inaccurate, and I wanted to clarify the facts.

I have belonged to the Country Club of Little Rock since 1978. The Club's By-laws do not restrict membership in any way. The Club has Jewish members, women members and an African American member. The African American member, Howard Curtis Reed, joined the Club in 1992.

The Club has never turned down the application of an African American for membership. I would have resigned immediately if I believed that the Club would reject an applicant on the basis of race. I believed the best course was to work from within to change the membership of the Club.

Members of the Club as well as members of the African-American community in Little Rock who are not Club members will tell you that I worked with other members to recruit African-Americans to join the club. We sought to insure that the membership of the Club reflected the Club's policy of non-discrimination.

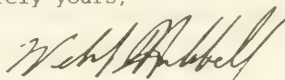
Over a period of years I approached African-American members of the community to solicit their interest. I spoke to other Club members, particularly those on the Board, of which I was not a member, to encourage affirmative membership efforts. As the Club's manager Gerald King told the Committee's staff, I wrote a letter to Board members urging that the Club take affirmative steps to recruit African-Americans. I have supplied the names of some of the individuals familiar with this effort to the Committee Council.

Senator, I have always chosen to work to change institutions from within. I believe fervently in the principles of racial equality and equal opportunity and have tried to act upon those principles in all aspects of my public and private life. People in Little Rock will tell you that, as a public official and a private citizen, I have worked to remove racial barriers.

I invite you to contact leaders in the Little Rock African-American community who are familiar with my commitment to equal rights. I suggest you communicate with Mahlon Martin, Little Rock's first African-American City Manager whom I recruited while I was Mayor; Lottie Shackelford, former Little Rock Mayor with whom I served for six years on Little Rock's City Board; Judge Les Hollingsworth with whom I served on the Arkansas Supreme Court; James Rogers, who is Little Rock's Airport Manager; Charles Bussey, Little Rock's first African-American Mayor; or Howard Curtis Reed. Mr. Reed stated in this morning's Washington Post that I, among others, was instrumental in his decision to seek membership in the Club. I am confident that you will find that my actions reflect my convictions.

I hope that this answers any questions you might have. I would be happy to discuss this or any other issue further with you.

Sincerely yours,



Webster L. Hubbell

cc: ~~Sen~~ Senator Joseph R. Biden  
Chairman  
Senate Judiciary Committee

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May 13, 1993

The Honorable Paul Simon  
United States Senate  
Washington, DC 20510

Dear Senator Simon:

I am distressed that this letter is necessary, but I must inform you of my unwaivering support of Webb Hubble for Associate Attorney General. The controversy surrounding Webb's membership in the Country Club of Little Rock should be viewed as a positive in that he has been an agent of change for that club, and will be in other similar situations.

As a personal friend and fellow member of CCLR, Webb has visited with me on numerous occasions about the need for our club to admit black members and other minority members. Although I cannot site dates and times, I am aware of his work behind the scenes to get this done. Webb's resignation from CCLR or his rejection by the Senate seems somewhat the opposite approach we should take in effecting these changes in America.

Webb Hubble is a good man with high values and moral standards and to top it off, has the experience needed to complete the job assigned. He has, with great sacrifice to himself and his family, embarked on the changes necessary to move from Little Rock to Washington to serve our country and his President. I support him wholeheartedly.

Should you need any additional information from me, I will do my best to help.

Sincerely,

Timothy P. Farrell, CIC  
President

TFF/jj

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## U. S. Department of Justice

## Office of Legislative Affairs

---

Office of the Assistant Attorney General

Washington, D. C. 20530

January 11, 1994

The Honorable Joseph R. Biden  
Chairman  
Committee on the Judiciary  
United States Senate  
Washington, D.C. 20510-6275

Dear Mr. Chairman:

This letter responds to the questions for the record submitted by Senator Kennedy to Associate Attorney General Webster Hubbell regarding the Immigration and Naturalization Service asylum officer corps.

If I can be of further assistance in this or any other matter, please do not hesitate to contact me.

Sincerely,

A handwritten signature in cursive script that reads "Sheila Anthony".

Sheila F. Anthony  
Assistant Attorney General

Enclosures

Question for the Honorable Webster Hubbell  
from Senator Edward M. Kennedy

As you may know, I worked very hard with the previous Administration to establish the new Asylum Officer Corps at INS. Asylum is a unique area of law and practice, and it was important to separate that activity from the normal work of INS and to train the officers in refugee law and human rights.

The new asylum officers are an extraordinary group of people.

However, the Corps is already overwhelmed. They inherited 230,000 cases from the old system. With the new cases filed, the backlog will be 330,000 by the end of the year.

I believe we have to do two things.

First, we need to make the Corps -- as well the Immigration Judges who handle asylum cases, too -- more efficient.

Second, the Corps needs more resources. We have only 150 officers who will receive over 100,000 new applications this year. We have fewer asylum officers in proportion to the caseload than any developed country except Germany.

Too often, asylum is viewed as a throw away, "do-gooder" program by INS, the Justice Department and OMB. Yet, fairly protecting those fleeing persecution is one of our oldest and proudest traditions.

Will you give priority to helping the Asylum Corps and our asylum system generally cope better with its important task?

Would you be willing to explore ways of increasing funding for the Asylum Corps, as well as making the system more efficient?

\* \* \*

Response of Webster Hubbell  
to Questions from Senator Edward Kennedy

The Department of Justice and INS Commissioner Doris Meissner are giving top priority to streamlining the INS asylum review process and reducing case backlogs. A comprehensive study of the process has been completed, and regulatory changes are being implemented which will reduce the amount of time and officer hours that are currently required to adjudicate each case. The size of the asylum officers corps also is being doubled to 300.

The Administration is actively seeking to increase funding for asylum-related activities. In 1993, the Administration requested, and Congress appropriated, an increase in the INS inspections user fee from \$5 to \$6, some of which could fund the establishment of an expedited exclusion process at certain U.S. ports-of-entry. Under this new procedure, which needs statutory authorization, a covered alien would not be able to apply for asylum unless the alien established that he or she had a credible fear of persecution in the country from which the alien had departed or of return to persecution. In addition, we are working to ensure that the asylum program receives a portion of the Violent Crime Reduction Trust Fund. These measures would reduce asylum case backlogs and discourage additional fraudulent claims, while at the same time maintain fairness and accuracy in the review process. I appreciate the support you and your colleagues are giving to these important initiatives.

# NOMINATION OF DREW S. DAYS III TO BE SOLICITOR GENERAL

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THURSDAY, MAY 20, 1993

U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The committee met, pursuant to notice, at 10:16 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Joseph R. Biden, Jr., (chairman of the committee), presiding.

Also present: Senators Metzenbaum, Simon, Feinstein, Moseley-Braun, Hatch, Thurmond, Simpson, Grassley, and Cohen.

## OPENING STATEMENT OF CHAIRMAN BIDEN

The CHAIRMAN. The hearing will come to order. Today, the Judiciary Committee continues its consideration of Department of Justice nominees, hearing from our third and final nominee in this series, Drew Days. Drew Days is the President's choice for Solicitor General of the United States, the Government's lawyer before the Supreme Court, and I might add from the perspective of most lawyers, and I think most of us on this committee are lawyers, is one of the most prestigious positions any lawyer can attain in this Government and has such a rich history with such great people, great men, who have occupied that position.

The Solicitor General occupies a unique position in our Government. As principal advocate on behalf of the U.S. Government, he is an executive branch official and he must listen to the interests of the President and the Attorney General that he serves. But at the same time the Solicitor General must also command a certain independence. He is, in fact, counselor to the Court, and he must always bear in mind the special trust the Court places in him because of that historic role.

Traditionally, because of the special trust accorded him, the Solicitor General has helped shape the development of constitutional law to an extent unknown by any other advocate who appears before the U.S. Supreme Court. In my mind, his or her influence over our constitutional jurisprudence more than any person, apart from the Supreme Court Justices themselves, has been the mark of former Solicitors General.

Striking the appropriate balance between these competing concerns is a very difficult task, as is illustrated by criticisms of past Solicitors General for failing to be independent enough. I believe it is imperative for our new Solicitor General to strike the right balance, to understand his obligations to the Court and to the Constitution itself, as well as to the administration.



So I welcome our nominee, a man who is not unknown to this committee, a man who came before this committee for confirmation back in 1976 or 1977—

Mr. DAYS. 1977.

The CHAIRMAN. 1977. Professor Drew Days has only two liabilities that I am aware of. One, he is a professor at Yale Law School. Two, he has Dodd and Lieberman here to suggest that he should be the Solicitor General.

But, Professor Days, we do welcome you. It is an honor to have you here and we look forward to discussing some important issues, and in my case particularly I am going to want to know about how you view the role of the Solicitor General and how you are going to attempt to deal with this delicate, although, I believe, important balance.

I yield to my friend from Utah, the ranking member.

#### OPENING STATEMENT OF SENATOR HATCH

Senator HATCH. Thank you, Mr. Chairman. I want to welcome you, Professor Days, to the committee and your two excellent Senators from Connecticut. I don't think they are a disadvantage to you. Senator Lieberman is an excellent lawyer and Senator Dodd spends a lot of time untangling all the messes that the lawyers around here make. So I think you have two really fine people here to testify for and on your behalf.

I want to congratulate you on your nomination to become Solicitor General of the United States. I want you to know that I know you to be a fine person, I know you to be an outstanding lawyer, and I know you to be a dedicated public servant. In my opinion, President Clinton could not have picked a better person for this job at this time.

If confirmed, Professor Days will occupy a position of special trust and power in our Government. The Solicitor General heads the office that is responsible for representing the United States both as a party and as an amicus in litigation before the Supreme Court of the United States. As the Federal Government's top Supreme Court litigator, the Solicitor General takes position on a broad range of constitutional and statutory questions with far-reaching significance.

The positions that Professor Days and his predecessors have made or may make may profoundly affect the development of the law for generations to come. So with this power, of course, comes responsibility. The Solicitor General must keep in mind that he represents the United States, not just the current administration. His duty is to advance legal positions that are faithful to the Constitution and the Federal laws. If confirmed, Professor Days will follow a long tradition of very distinguished advocates who have served as Solicitor General of the United States.

So, again, I welcome you. I look forward to a probing discussion of your views on matters of constitutional and statutory interpretation, and again I just want to say that having known you for all these years, I have a great deal of faith in your capacity and your ability to do this job and in your willingness and the good nature that you have always displayed to us down here and I think in all the work that you have done. I think the students at Yale are the

losers at this particular time, but the United States in general will be the winners.

I hope that you will enjoy this job and that you will have a very profound and good time while doing it. So, welcome. We are glad to have you here and I look forward to hearing your responses.

The CHAIRMAN. Thank you, Senator. We would ordinarily go to our introducers this morning, but Senator Metzenbaum has a conflict in terms of schedule and I yield to him for a moment.

#### OPENING STATEMENT OF SENATOR METZENBAUM

Senator METZENBAUM. Thank you very much, Mr. Chairman, and I am indeed going to have to leave for another committee hearing. Just as a prefatory note on the question of the vote as to whether Dodd and Lieberman are advantages or disadvantages to have with you, I vote with the Chairman—disadvantages. [Laughter.]

Senator COHEN. In a spirit of bipartisanship, I join both of you.

Senator METZENBAUM. Maybe you can do better down the line here.

Senator DODD. We are not doing very well. Maybe we ought to leave, Joe.

Senator METZENBAUM. Having said that, I am very pleased and proud that the President has seen fit to designate you Solicitor General. There aren't many higher ranking positions that one can hold in the U.S. Government. There are a few that call for a higher degree of integrity, intelligence, and willingness to apply yourself to difficult situations.

We have known you; you have worked around the Congress. We have known you when you appeared before the Congress and in every instance you have acquitted yourself admirably well. I can't tell you how pleased I am to see you in this position, and I know that you will make all of us proud as the next Solicitor General of the United States and I wish you well.

The CHAIRMAN. Senator Moseley-Braun has a similar conflict and I would yield to her for a moment.

#### OPENING STATEMENT OF SENATOR MOSELEY-BRAUN

Senator MOSELEY-BRAUN. Thank you, Mr. Chairman. My first bill-signing over at the White House, so I am looking to get over there.

The CHAIRMAN. You are 5 years ahead of most of us. [Laughter.]

Senator MOSELEY-BRAUN. Thank you, Mr. Chairman. I just hope I am as fortunate to have the kind of record of productivity as the Chairman has had over the past several years.

The CHAIRMAN. Well, thank you very much.

Senator MOSELEY-BRAUN. Thank you. I am delighted to welcome you, Mr. Days, to this committee. As this Nation's principal attorney before the Supreme Court, the Solicitor General must uphold the highest standards of scholarship, integrity and capability. Your dedication to the rule of law and the cause of equal justice, as evidenced by your service as Assistant Attorney General for Civil Rights, your tenure at the Yale Law School, although I won't hold that against you, and your work with the NAACP Legal Defense

Fund, indicate that you have the potential to be one of the outstanding Solicitors General in this Nation's history.

As you know, the position of Solicitor General was once held by the late Supreme Court Justice Thurgood Marshall. As I reflect on your career in public life, I can't help but notice the similarities between your career and the career of the late Justice Marshall, particularly in your dedication to ensuring that no individual is denied their fundamental constitutional rights under the law on the basis of race, religion, gender, or mental or physical disability. I can think of nothing more appropriate to honor the legacy of the late Justice Marshall than confirming your appointment as Solicitor General, and I look forward to doing so and I am delighted with your nomination.

Senator SIMON. Mr. Chairman, I am in a somewhat similar situation.

Senator DODD. If you would leave, Senator Biden, we could get this thing over with. [Laughter.]

The CHAIRMAN. The Senator from Illinois.

#### OPENING STATEMENT OF SENATOR SIMON

Senator SIMON. We have a Foreign Relations business meeting starting at 10:30 and I should be there for that.

The CHAIRMAN. You have my proxy. There is no need for me to be there.

Senator SIMON. I simply want to join the others in wishing you the best. I think it is an excellent appointment. As my colleague from Illinois has said, you represent scholarship. I think more important than that, I want the Court to be the champion of those less fortunate in our society. When the Court has done that, it has been the Court at its best. You are going to help shape what the response of Government is. You are going to have to help shape what the Court does and I think you are going to shape it well.

Thank you, Mr. Chairman.

The CHAIRMAN. So far, you are doing well, Mr. Days. The only thing that would be better would be if all the Republicans agreed to leave, too, but I yield to my friend, Senator Cohen.

Senator COHEN. Mr. Chairman, since I was the first to arrive once again today—

[Laughter.]

Senator COHEN [continuing]. Well ahead of the 10 timeframe, I would like to question the witness before he even makes a statement, but I will defer until he has an opportunity to make a presentation.

The CHAIRMAN. Senator Dodd.

#### STATEMENT OF HON. CHRISTOPHER J. DODD, A U.S. SENATOR FROM THE STATE OF CONNECTICUT

Senator DODD. Well, very briefly—I don't want to jeopardize this nominee's chances by saying anything here. [Laughter.]

Senator Lieberman and I are deeply honored that Drew has asked the two of us to be here this morning to present him to this committee. Mr. Chairman and Senator Hatch, my good friends and colleagues, I thank both of you and the other members for your generous statements this morning. I think it is quite obvious that



President Clinton made an excellent choice and I commend him for recommending Drew to this position. I also commend Drew for accepting this responsibility.

As all of you on this committee know, the work of the Solicitor General does not always receive the greatest amount of attention. But as you pointed out earlier, Mr. Chairman, the job of Solicitor General is one of the most coveted positions and honored positions within the legal profession.

This nominee will be charged, as his predecessors have been, with representing our Government before the Supreme Court. Throughout our history, we have had many distinguished Solicitors General. Our colleague, Senator Moseley-Braun, pointed out the excellent work done by Thurgood Marshall. Robert Jackson, who was the chief prosecutor for the United States at Nuremberg, of course, was also a distinguished Solicitor General. Archibald Cox also comes to mind. Indeed, there is a long list of those who have served this country.

In Drew Days, you have an insightful, dedicated, and principled nominee who will carry on that tradition of excellence.

Drew's association with our home State of Connecticut dates back to the 1960's when he was a student at Yale Law School. After his graduation, Drew went on to practice law in Chicago, but did not stay in private practice for long. Instead, he responded to President Kennedy's echoing call to national service joined the Peace Corps—an experience we have in common. Drew served as a volunteer in Honduras in the 1960's and did an excellent job working in the cooperative movement in that country.

His commitment to the less fortunate is evident not only from his work in Honduras but also from his work as a professor at Yale where he directs the school's Center for International Human Rights.

Of course, Drew is best known for his efforts to make our Nation's legal system live up to its promise of equal justice for all. As a litigator with the NAACP Legal Defense and Education Fund, he fought to desegregate our Nation's schools. He also administered a program that helped African-American lawyers set up private practices in their hometowns. Recognizing Drew's talents, President Carter appointed him Assistant Attorney General for Civil Rights.

More recently, Drew has devoted his energies to the education of the next generation of lawyers at Yale. He has earned the respect of his colleagues and students, and received numerous awards and honors from across this country. Hopefully, his students have learned the balanced approach to issues that characterizes his legal scholarship and the many other talents that I know he will bring to this position.

Members of the committee, there is much more that could be said to recommend this nominee, but by your opening remarks I think many of you on the committee appreciate and know this nominee and are confident of the kind of job he will perform. So I am very pleased this morning to be one of his presenters.

In closing, I would just share with you an observation from Justice Oliver Wendell Holmes. Holmes said that the "law embodies the story of a Nation's development through many centuries and it cannot be dealt with as if it contained only the axioms and cor-

ollaries of a book of mathematics." Justice Holmes suggests that legal scholars must understand the various forces, historical, political, and social, which guide the law's development. Drew Days approaches the law, I believe, in that same manner. He knows the battles which have been fought to make this country's laws more just. Indeed, he has been engaged directly in those battles and he understands the need to search for the spirit behind the letter of the law.

On a personal note, I spend one morning a week, or try to anyway, at a public high school in Connecticut talking to juniors and seniors. I recently spoke at Wilbur Cross High School, one of the large public high schools in New Haven, CT, where Yale is located.

One of the most insightful questioners I had at Wilbur Cross was a young woman. Afterwards, she came up and introduced herself and I had the pleasure of meeting Elizabeth, Drew's daughter. She is a delightful individual who reflects her father's concern with education. I think every one of you would have been proud to have been in that audience and to have heard this talented youngster press a U.S. Senator on important questions of the day.

Once again, it is a pleasure to be here this morning to present Drew to the committee, and I am very confident he will make a great Solicitor General.

The CHAIRMAN. Thank you very much, Senator; well said. Senator Lieberman.

#### STATEMENT OF HON. JOSEPH I. LIEBERMAN, A U.S. SENATOR FROM THE STATE OF CONNECTICUT

Senator LIEBERMAN. Thank you, Mr. Chairman, Senator Hatch, members of the committee. I am very proud to join with my colleague, Senator Dodd, in introducing Drew Days to you as the President's nominee for Solicitor General.

Mr. Chairman, there was a former attorney general of New York, Louie Lefkowitz, a great Republican attorney general of New York, who used to be referred to as the people's lawyer. Actually, there was a previous attorney general of the State of Connecticut who occasionally and shamelessly borrowed that title. But it is the Solicitor General of the United States who is truly the lawyer for the people of the United States before the highest court of the United States. It is therefore a position of real importance, and I think the President honestly could not have chosen a person better prepared to fill this high office and be the American people's lawyer than Drew Days.

You have heard about his credentials. They are strong, they are deep, they are impressive. I have known Drew since our days together, yes, at Yale Law School.

The CHAIRMAN. I know, I know, I know. [Laughter.]

Everyone is from Arkansas or Yale.

Senator LIEBERMAN. I want to say quickly that he should not be held responsible for anything I did while at Yale Law School or since. I think that is only fair to him. But the qualities that I saw then have been only evidenced and demonstrated on a wider canvas in the years since then, a person of extraordinary personal intelligence and skill and integrity and balance.

He is a very experienced constitutional litigator, having worked for the NAACP Legal Defense Fund and, of course, having been Assistant Attorney General for Civil Rights, and then gone on to be a teacher at both Temple Law School and Yale Law School. I gather that it was a very impressive performance as a litigator in the fifth circuit courtroom of Judge Griffin Bell that brought Drew Days to Judge Bell's attention and led Judge Bell to ask him to join him during the Carter administration as Assistant Attorney General for Civil Rights.

But the point I want to stress here is the one that I think everybody has touched on. Beyond the professional skill, we have here an extraordinary human being. Ultimately we are at our best when served by people in high offices like Solicitor General who bring not only experience and intelligence, but values, because we hope and believe, of course, that the law ultimately is all about values.

Drew Days is a person of unquestioned integrity, of strong personal values. He has the kind of temperament that I think will, at one and the same time, enable him to be the strong calm in the storm that the Solicitor General's office can be, and also be a very effective litigator before the Supreme Court, transcending some of the divisions ideologically that may exist on the Court. In other words, this is somebody who goes above the traditional legal points of view and commands respect because of the strength of his person, and in that sense ultimately I think he will be a wonderful advocate for the people of the United States.

So Senator Hatch was quite right. This is Yale Law School's loss, it is Connecticut's loss, but we are proud to say that it is clearly the Nation's gain, and very proud to present Drew Days to you today.

The CHAIRMAN. Thank you very much, Senator. I did a lot about Yale; everyone does these days. Obviously, it is one of the great institutions in the country. I think the greatest testament to your nomination is the people who did not get nominated. I know personally because I was part of the process, with the President asking me my view, that there were two people, one of whom is in this audience, who would make a phenomenal Solicitor General, one from a little north of New Haven who would have been equally great.

I cite that not to suggest that they would have been better. They would not have necessarily been better, but you were in competition for this job with some of the great legal minds in this country and it is, it seems to me, a real honor to be chosen by the President from among the competition.

Senator COHEN. I was hoping you wouldn't disclose the fact that I was in the running. [Laughter.]

The CHAIRMAN. Well, I was about to say that.

Senator DODD. Not that far north. [Laughter.]

The CHAIRMAN. I tried very hard to suggest to the President that he either pick Hatch or Cohen because we could pick up a Senate seat, but he did not want to do that. [Laughter.]

Let me tell you how we are going to proceed because I think maybe the public, since we are being so collegial here, maybe thinks that we don't take this as seriously as we obviously do. A lot of us know you very well and we have great respect. The last



2 days, the four Senators who have been introducers are, by anyone's standards, four of the best-known and most respected members of the Senate, and so I don't want the public to get the wrong impression.

I also don't want anyone to get the wrong impression of how we are going to proceed. Yesterday, it was suggested that we should proceed based on the early bird rule. I have decided we are going to proceed based on seniority, and toward the end I am going to yield my seniority rights when I swear you in to my colleague from Maine, because he has a conflict in terms of schedule, and let him question first and then go to Senator Hatch, who has agreed we could do that as well, and proceed that way.

Before we do that, I would like you to do two things. I would like you to stand to be sworn, and also introduce any family members you may have here after we do that.

Mr. Days, do you swear that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. DAYS. I do.

The CHAIRMAN. Would you be kind enough to introduce any family members you have with you today?

#### TESTIMONY OF DREW S. DAYS III, TO BE SOLICITOR GENERAL, U.S. DEPARTMENT OF JUSTICE

Mr. DAYS. Yes; my wife of 27 years is here, Ann Langdon.

The CHAIRMAN. Welcome.

Ms. LANGDON. Thank you.

Mr. DAYS. My sister, Jacqueline Serwer—

The CHAIRMAN. Ms. Serwer, welcome.

Mr. DAYS [continuing]. With whom I have had a long relationship. [Laughter.]

Mr. DAYS. And my nephew, Jared Serwer, who is a student here.

The CHAIRMAN. Welcome.

Mr. DAYS. I want to introduce also Allen Green, one of my oldest friends.

The CHAIRMAN. Allen, welcome.

Mr. DAYS. And Gloria Branker, who has been a very dear friend and secretary of mine for many years.

The CHAIRMAN. My sympathies. [Laughter.]

My mother has an expression: no purgatory for you, dear, straight to heaven.

I thank our colleagues from Connecticut and now, without any further delay, I would invite you to make an opening statement, Mr. Days, if you would, and then I will yield to my friend from Maine.

Mr. DAYS. Thank you, Mr. Chairman. I want to thank you and other members of the committee for giving so graciously of your time to meet with me over the past few weeks about my nomination to become the next Solicitor General of the United States. I appreciate the frankness with which each of you expressed your concerns about the proper discharge of the Solicitor General's duties and hope that you found me equally forthcoming in responding to those concerns.

I also want to thank Senators Dodd and Lieberman for introducing me to the committee this morning. Like many Americans, I have led a rather peripatetic existence—born in Georgia, early youth in Florida, late teens and early adulthood in New York, and then a series of moves during and after law school from Connecticut to Illinois to Honduras to New York to Pennsylvania to the District of Columbia, and finally back to Connecticut in 1981. It has been an itinerant but fulfilling life, but I want both Senators to know how especially happy my family and I have been as citizens of New Haven and of Connecticut during the past 12 years.

As a student of Greek tragedy, I have been fairly successful thus far in controlling what the Greeks refer to as overweening pride, but as both of you, Mr. Chairman and Senator Hatch, have commented, you must understand how honored I feel to have been chosen by President Clinton and Attorney General Reno to become this administration's chief lawyer before the Supreme Court of the United States.

The late Justice Thurgood Marshall said it was the best job he ever had, and I think he actually said it was the best job he ever had, bar none. It is a job that most lawyers would give anything to have, and there are undoubtedly a number of lawyers who would serve with distinction as Solicitor General, to echo your observations, Mr. Chairman.

All things considered, I am gratified that the President and the Attorney General, after assessing my qualifications for the job, selected me. As a lawyer for the NAACP legal defense fund for 8 years, I spent much of my time on Supreme Court issues, largely writing briefs opposing review in cases that I had won in the lower courts or filing friend of the court briefs in cases involving other parties.

During my tenure with the legal defense fund, I also litigated scores of cases at both the Federal trial and appellate court level. Indeed, it was in this connection that I came to the attention of then Judge Griffin Bell, who later as Attorney General asked me to become his Assistant Attorney General for Civil Rights.

As Assistant Attorney General for Civil Rights, I had the pleasure of working closely with President Carter's distinguished Solicitor General, the late Judge Wade H. McCree. I spent a significant part of each day discussing what the Department's position should be and then reviewing drafts of Government briefs in Supreme Court cases. In addition to working on the preparation of briefs before the Supreme Court, I also was fortunate to have been invited by the Solicitor General to argue for the United States in five cases raising issues that fell within the responsibility of the Civil Rights Division.

As a law professor, first at Temple University in the 1970's and more recently at Yale, I have suffered from a disease common to legal academics of being an incurable Courtwatcher and analyst with respect to the Court's membership, practices, and opinions. The opportunities for me to pursue this activity have been presented daily in my courses over the past 12 years in the areas of civil procedure, Federal jurisdiction, the first amendment, comparative constitutional law, and antidiscrimination law. For the past several years, I have also taught a seminar on Supreme Court

practice focusing on the strategic choices of lawyers, including the Solicitor General, involved in constitutional litigation.

A major attraction of the Solicitor General's job for most lawyers, I suspect, is that he or she serves as the Federal Government's lawyer before the Supreme Court, affording the incumbent an opportunity to appear personally before the Court in interesting and important cases on a regular basis. I am no exception. However, I am also drawn by the prospect of performing the less public functions of the Solicitor General. Of particular interest to me is the duty to ensure that the Government speaks to the Court in a coherent voice, shaping the most responsible position on behalf of the United States.

In carrying out this responsibility, the Solicitor General ultimately must take a stand, but I believe that he or she also has a duty almost judicial in character to hear out competing views within the administration prior to arriving at a final position and, wherever principle permits, to seek to reconcile differences of affected agencies.

A similar process should take place when the Government contemplates entering a case in which it is not a party or has been invited to do so by the Court. The Solicitor General must listen to the views of the parties in such cases and weigh carefully the consequences of the Government's participation for the interests of the United States and the orderly development of the law. A critical element in this process is the longstanding tradition that the Solicitor General should exercise his or her judgment in an independent fashion in making these decisions. I intend to honor that tradition.

I am aware that the Solicitor General's job is not an easy one, for it entails on the one hand being a forceful and effective advocate for the Government before the Supreme Court. On the other hand, the Solicitor General, for both ethical and pragmatic reasons, has a duty toward the Supreme Court of absolute candor and fair dealing.

As former Solicitor General Simon E. Sobeloff said, "My client's chief business is not to achieve victory but to establish justice." I believe that my training, experience, and personal style will enable me to perform these functions effectively. Dean Erwin Griswold has remarked that "it is a tightrope, but the Solicitor General should keep his balance." I hope that all who deal with me, if confirmed as Solicitor General, will perceive me as a person of the highest professional integrity and will respect my decisions even when they may disagree with my results.

With your indulgence, Mr. Chairman, and that of the committee, I would like to make one final point. Over the last 12 years, I have been actively involved, as both my Senators mentioned, in promoting human rights abroad, most notably in my capacity as the director of a research center at Yale Law School. This work has required me to travel to a number of countries in Asia, Africa, and Latin America, and to evaluate their judicial systems.

Unfortunately, I have found too few instances in these countries where lawyers and judges are free to act with independence and where other government officials feel themselves bound to honor legal limits set by the courts. These experiences have caused me to appreciate even more deeply than before the genius of our judicial



system in general, and in particular the impressive degree to which most Americans show respect for the rule of law.

Since the office was established in 1870, remarkable Solicitors General, both Democrats and Republicans, have contributed in no small measure to building and reinforcing this attitude among our citizenry. It is another tradition that, if confirmed, I intend to uphold with all the strength within me.

Thank you again. That completes my prepared statement, Mr. Chairman. I would be pleased to answer any questions that you or other members of the committee may have.

The CHAIRMAN. Let me just say, Mr. Days, your last statement, I think, is the most significant one you have made that the legitimacy of the Court depends in large part upon the consensus of the American people that what is being sought is reasonable, and I reaffirm your view and I am glad to hear you say that because sometimes both left and right, in Democratic and Republican administrations, that is forgotten, and it has no army.

At any rate, I yield now, with the permission of Senator Hatch, to our friend from Maine, Senator Cohen.

#### OPENING STATEMENT OF SENATOR COHEN

Senator COHEN. I thank the chairman for yielding, and let me say that as a senior member of the Armed Services Committee, I deeply resent the early-bird rule that has been established over there. They have forsaken any respect for wisdom that has been accumulated by my years on that committee. As a junior member of this committee, however, I would like to see the early-bird rule re-established. In any event, I understand the chairman's motivation.

Mr. Days, you indicated you are a student of Greek tragedy. I suspect you are also a student of Greek philosophy. Not only are you familiar with hubris, but I'm sure you are also familiar with a concept called *arête*. The Greeks reserved that for their heroes, and that meant nobility. It didn't mean nobility of blood, but nobility of spirit and nobility of purpose. I associate that concept with your life and the history that you have accumulated through your service.

I would like to just turn quickly to a couple of subject matters and be as brief as I can. You were quite critical of Judge Thomas when he came before this committee for confirmation. Philip Heymann, who appeared earlier this week, was also quite critical of Robert Bork. He wrote an article in the *Cardozo Law Review*, as I recall, that was very critical of Robert Bork. I was wondering, do you share Mr. Heymann's views about the appropriateness of Judge Bork having been nominated to serve on the Supreme Court? Would you have opposed his nomination as well?

Mr. DAYS. Yes, I would have.

Senator COHEN. Based upon the fact that he did not have sufficient respect for *stare decisis* or the Court's decisions that have accumulated over the past 20 or 30 years? Did you share the view that his nomination would have constituted a radical departure from a commitment to those cases that were decided let us say, from the Warren Court on?

Mr. DAYS. No; that was not my view of Judge Bork.

Senator COHEN. What was your view?

Mr. DAYS. Well, my view of Judge Bork was that the positions that he had taken both before he was nominated to the Supreme Court and during the hearings were, in my estimation, inconsistent with what I understood to be the direction of constitutional law, particularly on the issue of the right of privacy.

Senator COHEN. Do you draw a distinction between Justice Scalia's and Judge Bork's view of the Constitution?

Mr. DAYS. Well, there certainly are differences and I don't know either's views exhaustively, but I think that in many respects they approach the job in a similar way. Their mode of analysis is very similar.

Senator COHEN. Would you agree that there is very little distinction between the view that Justice Scalia holds of the role of Congress, let us say, or indeed the constitutional process and that of Judge Bork?

Mr. DAYS. I am reluctant to make a statement on that, Senator.

Senator COHEN. I am not trying to review your views on the past nominees, but rather to try and place it in some context—

Mr. DAYS. Yes.

Senator COHEN [continuing]. Because I think you have indicated that now Justice Thomas approached civil rights issues, at least, with more of a rhetorical or superficial analysis, and that he did not have a sufficient historical appreciation of the civil rights movement. That is a rough paraphrase of your views.

Mr. DAYS. That is correct, Senator.

Senator COHEN. The question I have at this point is, How do you intend to approach the Court on, let us say, a civil rights issue, having expressed publicly a view as strongly as you did of Justice Thomas? Does that create a conflict for you or for him? As you know, in the past there has been a practice on the part of some Justices to recuse themselves from considering cases that might create an appearance of a conflict if they rule against an individual litigating a case before the Court. It would be seen as perhaps being vindictive or less than objective? Does that create a problem for you as Solicitor General, if you are confirmed, in such a situation?

Mr. DAYS. I don't believe so, Senator. First of all, I will be appearing before the Court representing the United States, not representing my personal views. But in addition to that, I regard Justice Thomas as a professional. I hope he regards me as a professional, and I expect that both of us will go about our jobs in that spirit. My job is going to be to try to present to the Supreme Court the best arguments I can summon and I would like to think that all the votes on the Supreme Court are at least theoretically available to me to prevail in cases where I think merit dictates.

Senator COHEN. In other words, there will be no need for either you to recuse yourself from arguing a case or for Justice Thomas to rescue himself from hearing the case?

Mr. DAYS. Not at all. My testimony against Judge Thomas, as he was at the time, was not in any sense a personal attack upon him. It was simply giving my perspective on his views.

Senator COHEN. Right.

Mr. DAYS. I once understood that it is the tradition for the Solicitor General, once confirmed, to pay courtesy visits on the members

of the Court, and I would think that Justice Thomas and I, if there are any differences, will discuss those and put them behind us.

Senator COHEN. Do you favor the death penalty?

Mr. DAYS. I do not, Senator.

Senator COHEN. Janet Reno, as the Attorney General, is in favor of the death penalty. President Clinton has also advocated that position. How does that now comport with your position that you may be called upon to argue a case before the Supreme Court on the death penalty? How would you reconcile your own personal opposition with the obligation to represent the administration or the people?

Mr. DAYS. Yes; well, I share the Attorney General's view on the death penalty. I believe she is opposed to it. But I also share her view with respect to the duty of a public official to carry out the law as it is written and to make certain that there is an argument made to the Court that is consistent with the law. And I think that on capital punishment the Court has made clear over a number of years that it is not a violation of the eighth amendment cruel and unusual punishment provision of the Constitution, and therefore I will present cases with that precedent in mind.

Senator COHEN. Let me just turn quickly to the issue of *McCleskey v. Kemp*.

Mr. DAYS. Yes.

Senator COHEN. I think you have both written and spoken on this issue in the past. As a matter of fact, I have read a text of the speech you made in 1987 to the Stanford Commission on the U.S. Constitution that was entitled "Living Without the Constitution." As I recall, you came to the conclusion that anyone who is attempting to prove that the system is unconstitutional must show that it is intentionally discriminatory, correct?

Mr. DAYS. That is correct.

Senator COHEN. Assuming Congress were to pass a bill that would prohibit the death penalty when there is a pattern of racial discrimination, and this has been advocated by at least one member or several members of this committee in the past, how would you present that to the Court? Would you argue for or against its constitutionality in view of the *McCleskey v. Kemp* case?

Mr. DAYS. Senator, my position as Solicitor General would be to argue for the constitutionality of acts of Congress. My understanding is that although the Attorney General or the President can direct that there not be support before the Supreme Court for acts of Congress, only rare instances would justify that type of presentation and would have to relate to separation of powers issues; that is, where there was some indication that Congress was, in the eye of the President or the Attorney General, attempting to encroach upon the powers that are given to the President under article II of the Constitution.

Senator COHEN. Thank you very much, Mr. Days, and thank you, Mr. Chairman.

The CHAIRMAN. Senator, I appreciate it. I am going to yield now to Senator Hatch. But before you leave, and I know you have to leave, because it was raised yesterday, with regard to the distinction—and I am not suggesting that the witness would have to



speak to this, but the distinction between Justice Scalia and Judge Bork, on a number of very important issues they were at odds.

Justice Scalia's view of first amendment jurisprudence is fundamentally more restrictive than Judge Bork's view of first amendment jurisprudence. They have a significantly different view based on their writings and on the cases they have decided. In that case, by the way, they were at odds with each other in *Ullman v. Evans*, which was a clash of the titans on the right on this issue.

They have very fundamentally different views on the role of legislative intent, Justice Scalia essentially saying and writing, and I am paraphrasing him—I have made the mistake of teaching constitutional law now, so it has become a habit. Justice Scalia suggests that obviously—I am paraphrasing—everyone knows that the staff people write the legislative intent and the members don't understand it; therefore, we shouldn't consider it. I am being a bit facetious. Judge Bork has a different view, and also a very different view, if I recall, on the issue of the ability to delegate authority one branch to another on separation of powers issues.

So there are vast differences in their jurisprudence, notwithstanding they agree very much on the use of historical precedent and how to look at the existence of the emergence of values and the issue of privacy. They are very much more in line on that.

Senator COHEN. Mr. Chairman, could I correct something for the record? I believe that Mr. Days has indicated that Janet Reno does not favor the death penalty, so the record should stand corrected. I indicated she did and my recollection is that she—

The CHAIRMAN. Well, you are right in the sense that she said, although she did not favor it, she believed that it was constitutional, and she thought that it was appropriate for her to enforce such a principle and that she was going to focus on making sure there were enough safeguards between the finding of guilt and an imposition of the sentence.

Mr. DAYS. That is my position, also, Senator.

The CHAIRMAN. Senator Hatch.

Senator HATCH. Thank you, Mr. Chairman. Professor Days, as you know, the second amendment is not applicable to the States.

Mr. DAYS. Yes, sir.

Senator HATCH. Would you take the position that it could be applicable or that it should be applicable to the States?

Mr. DAYS. I am not going to be able to answer that question here, Senator. I would have to await a real case and try to determine, after consultation within the Government, what the position would be.

Senator HATCH. So your mind is open on that issue?

Mr. DAYS. That is correct.

Senator HATCH. You know, many people feel it should be applicable to the States and very little of the current Bill of Rights is not applicable to the States at this particular time.

Would you make use of the standing doctrine whenever an argument may fairly be made that the doctrine is applicable in a case in which the United States is involved?

Mr. DAYS. I am not certain I understand exactly how the standing issue would come into play, Senator.

Senator HATCH. Well, basically, what I am saying is that doctrine, of course, asserts that an opposing party is not an appropriate party to bring a cause of action, so it is a very important means of assuring that the Federal judiciary does not overstep its role in our Federal system. As such, it is important component of the separation of powers doctrine. The failure to assert a standing defense when it properly can be made, it seems to me, invites judicial activism on the Court.

Mr. DAYS. Absolutely; I think that it is a very complex doctrine, Senator, but I think the basic rule is one that ought to be adhered to because we should not be in the business of encouraging Federal courts to decide cases that are not, in fact, cases or controversies in the constitutional sense, or indeed where statutes are concerned where it does not appear that Congress intended that individuals be raising these issues independently before the courts.

Senator HATCH. Thank you. With regard to your role as an amicus, the Government's role as an amicus, do you have criteria in mind for determining in what cases and under what circumstances you would file amicus briefs to express the Government's position in cases in which the United States is not a party?

Mr. DAYS. I don't have a template, Senator, in that respect, but I have some considerations, some criteria, that will be important to me if I am confirmed in making that decision. The first criterion would be whether there is an interest of the United States in the particular controversy. Is there some impact that we think will be felt in a direct sense by the U.S. Government? There may be other cases where the impact is indirect, but significant, and that would be a justification for becoming involved in the case.

In my prepared statement, I talked about the importance of the Solicitor General's participating in the orderly development of the law, and I think that over the years the Solicitor General has participated in cases where he felt that his participation could assist the Court in doing that. And I am also very concerned about just the general issue of can the Government be helpful to the Court. The Court often confronts very difficult issues, and while there have been references to the Solicitor General as the 10th justice or the 9½ justice, I was struck by one commentator who referred to the Solicitor General as the 38th clerk; that is, to assist the Supreme Court in ways that the clerks who are hired by the Justices simply cannot because what the Solicitor General can do is draw upon the resources of the entire Federal Government to bring information to the Court so that when it arrives at a decision it feels that it has got all the information that it needs. This includes the Archives, it includes the Library of Congress and many of the agencies that have expertise in issues that might come before the Court.

Senator HATCH. Well, I would like to encourage you to offer such amicus support to States, especially in criminal cases where the support is merited. John Roberts, Deputy Solicitor General in the Bush administration, recently wrote in a Wall Street Journal article that after the last change from a Republican to a Democrat administration in 1977, the Justice Department, "filed markedly fewer amicus briefs supporting the States in criminal cases, both in absolute terms and as a percentage of all amicus filings." So I

hope you will consider that as a priority, as the last Solicitor General, Ken Starr, did.

Mr. DAYS. Yes.

Senator HATCH. I think it is very important that you do that, and I think there has been a big shift in the degree of sophistication in some of these cases as well, so that it might be easier for you to do it than maybe perhaps in some prior administrations.

Mr. DAYS. Well, I hope there will be balance in that respect, Senator. I am very sensitive to situations where State law enforcement officials really can benefit from the involvement of the United States, and I think that that often fits into the category of matters that have an indirect impact upon the United States because, after all, the Government is involved in law enforcement and many of the doctrines that apply to the States have either a direct or indirect application to the United States.

Senator HATCH. Mr. Roberts argued that during the Bush administration—he said:

The Federal Government assisted the States in defending challenges to the imposition of the death penalty in seeking to limit the availability of repetitious habeas corpus petitions and arguing in favor of constraining the scope of the exclusionary rule in defending the right of victims to testify at sentencing. The Solicitor General supported State efforts to secure the admission of evidence in child abuse cases, to attack drug driving through sobriety checkpoints, and to safeguard police on the front lines by defending the validity of protective sweeps when officers enter a dwelling to make a valid arrest.

I just hope that a close to similar assessment can be made four years from now about your tenure, or later if that is the case.

In your Stanford speech on the Constitution's Bicentennial on September 20, 1987, you discussed the Supreme Court's 1974 decision in *Milliken v. Bradley*. Now, there, the Supreme Court declined to order metropolitan-wide busing between Detroit's inner cities and the suburbs in the absence of any intentional educational segregation in those schools. In other words, the Court was not going to order that suburban school districts be consolidated into urban school districts to compensate for housing patterns.

You suggested in your speech that the decision was harmful for both suburban and inner-city children and that a future Court might reconsider *Milliken*. In another article of yours, "Dimensions of Equality" in *Law and Contemporary Problems*, published in the winter of 1992, you criticized *Milliken* again saying, "Under this compartmentalized view of State action, violations of constitutional rights may go effectively unremedied."

Now, do you still think that *Milliken* ought to be reconsidered, and as Solicitor General would you urge the Court to reconsider it and order the consolidation of suburban and urban city school districts, or at least order some busing between central city and suburban school districts?

Mr. DAYS. Senator, this raises the question that, of course, is a very serious one for every administration, and particularly for Solicitors General, and that is the role of stare decisis or the role of precedent. My view of *Milliken v. Bradley* is that that case has been on the books for a number of years. It has created standards that lower courts have applied. In some instances, they have found those standards satisfied and have ordered interdistrict desegregation remedies. In others, they found that those criteria were not



satisfied, and I think that what the decision has established is that it works fairly well.

Now, my position on *stare decisis* is that one has to show respect for it, but if there are changed circumstances, if there is new information, if there are insights that were not available to the Court at the time it decided a case like *Milliken*, then I might well find that we are back before the Court raising those issues.

But let me make the point here about the way that the office functions. The Solicitor General is not a philosopher king. He does not sit in his office looking at legal issues trying to determine which ones to attack and which ones to support. He really sits at the top of a large legal pyramid in the Federal Government, and issues that the Solicitor General is going to deal with come up through process of review at the lower level, from the agencies through the litigating divisions of the Justice Department.

And by the time matters get to the Solicitor General, a variety of issues have been worked out—policy issues, strategic issues. And I think that the Solicitor General in many respects has an important role as a legal technician in trying to determine whether what an administration is interested in doing can, in fact, be done with integrity, with support in the law, or at least in the process.

And so as Solicitor General, I don't expect that I am going to be sitting around saying I did give a speech in 1987 about *Milliken*, maybe that is something I ought to knock off now that I am Solicitor General. That is not the process at all.

In fact, I think one of the most impressive statements that has ever been made on *stare decisis*, and perhaps will be made, although that is a dangerous comment to make, is the opinion in *Planned Parenthood v. Casey*, the abortion case, in which Justices Souter, O'Connor, and Kennedy talked about the role of precedent. For me, they have expressed very clearly the importance of all legal officers, and particularly the Solicitor General, respecting precedent and being very careful not to go to the Supreme Court or the lower courts with challenges to existing precedent unless there is a good reason.

Herbert Wexler, a distinguished professor at Columbia Law School for many years, described it as a distinction between persistence and presumption, and I would like to be persistent in some respects as Solicitor General, but I hope that I will not be regarded as presumptuous; in other words, raising issues that have been settled by the Court where there is no indication that the Court is prepared to reconsider, and wasting the Court's time and I think the country's time.

Senator HATCH. Well, I appreciate that.

The CHAIRMAN. If the Senator will yield on that?

Senator HATCH. Sure.

The CHAIRMAN. You understand why some of us are concerned about that because there have been Solicitors General who have done what you have suggested you would not do, who have appeared to have sat there and said, you know, this is time to be presumptuous and to change the pattern and the development of the law.

It is not a question, I suspect, directed at you because of anything in your background, but it is a question that is directed and

has been raised in the 21 years I have been here because of the nature of the change in the way some Solicitors General have approached that role.

Mr. DAYS. Yes. Well, I also don't mean to say that I might not be before the Court taking a different position on cases that have been decided. I think that, as the Justices said in *Casey*, if people didn't challenge precedent under some circumstances, we would still be left with *Plessy v. Ferguson*. So I think that one has to achieve some balance between respecting stare decisis and being bold enough to challenge where there seems to be good and sufficient justification for doing so.

Senator HATCH. That is great. I happen to agree with that. I believe that one of the most important civil rights in this country is the right to enjoy one's property without confiscatory regulation. In my home State of Utah, for instance, overzealous Federal environmental regulators have made life very miserable for Utah land owners.

Last year, the Supreme Court in the *Lucas* case held that regulatory "takings" that result in a total diminution in property value of a piece of property are takings requiring just compensation for purposes of the fifth amendment takings clause. Now, do you believe that *Lucas* was correctly decided, and do you think that a regulatory taking that results in less than a complete diminution in the market value of a piece of property could be a taking requiring just compensation for purposes of the fifth amendment?

Mr. DAYS. Senator, I am not going to take a position on this issue at this point, but I do want to say generally that I think that it is a healthy development that the Supreme Court has come back to the takings clause and has begun to flesh out the doctrine with respect to that particular part of the Constitution.

Senator HATCH. I can't tell you what it means to farmers and others all over the West. You know, Utah is the second driest State in the Union. If a puddle of water develops, they start asserting their right to condemn property as wetlands in a completely bizarre interpretation of the definition of wetlands.

Mr. DAYS. Yes.

Senator HATCH. And that is happening all over this country. It is a confiscatory taking of property against the property rights of those property owners. It is highly offensive. Frankly, I think the Court has got to take a much stronger position than the *Lucas* case, but it certainly was a move in the right direction.

Mr. DAYS. Well, I am very sensitive to those concerns, and undoubtedly those issues will percolate up to me and I will have to deal with them. I just wanted to assure you that it is concern that I think is legitimate and I will carry out my responsibilities in that spirit.

Senator HATCH. Now, I understand I am out of—

The CHAIRMAN. No, no; go ahead because I interrupted you.

Senator HATCH. OK. I do have a lot of other questions I would just kind of like to go over with you—

Mr. DAYS. Yes.

Senator HATCH [continuing]. Because it is very seldom we have an opportunity of chatting with somebody like you who really is going to be in a position to make a real difference in everybody's

lives in this country and who really has the tremendously grand opportunity to advocate for the people. So this is a particularly important hearing. I mean, it is a foregone conclusion that I am going to support you. I have basically said that, and I said that to you in our office.

I just think you are a terrific human being, and even though we may differ on various issues, I don't know any two people that don't differ on some things. I am probably wrong anyway. [Laughter.]

At least I have millions of people who seem to think so from time to time. Every once in a while, though, I am right. I just want you to know that, and you are going to have to not guess when I am right.

Mr. DAYS. I am under oath, Senator. [Laughter.]

Senator HATCH. On September 20, 1987, in a speech again on the Bicentennial of the U.S. Constitution in Stanford, CT, you said that you disagreed with the Supreme Court's decision in *McCleskey v. Kemp*, and it was a 1987 decision, a very important decision. In that decision, the Supreme Court held that racial disparities in sentencing statistics could not, absent any evidence of discriminatory intent in a particular case, preclude imposition of the death penalty.

Now, you have honestly said that you are against death penalty. A lot of good people are for it and against it. It is a raging controversy—

Mr. DAYS. Yes.

Senator HATCH [continuing]. And will always be in this country. So my question is, and maybe it is repetitive, but do you still disagree with *McCleskey v. Kemp*, with that decision?

Mr. DAYS. I do—

Senator HATCH. And if so—let me just add a little bit more.

Mr. DAYS. Yes, yes.

Senator HATCH. If so, will you seek to overturn it?

Mr. DAYS. I do disagree with it. I have no present intention, for reasons that I described earlier, to—

Senator HATCH. Stare decision.

Mr. DAYS. Exactly right. But, Senator, if I might, I want to put that speech in context because what I was trying to accomplish in that speech was to say to the audience that there is more to democracy than the Supreme Court. There is more to living in America than simply figuring out what the Supreme Court has decided and going home.

I think that it is open to the people where the Supreme Court has said, for example, in *McCleskey* that this type of statistic is not evidence of a constitutional violation for in that case the people of Georgia to decide, well, even though it is not a constitutional violation, we are going to look into this issue and make certain that we are not discriminating against racial minorities in the imposition of the death penalty. That is what I was trying to get at.

Senator HATCH. Sure.

Mr. DAYS. What the Supreme Court decisions often do is establish a floor and not a ceiling for democracy.

Senator HATCH. Sure; in your winter 1992 article in *Law and Contemporary Problems* entitled "Dimensions of Equality"—and I will make this series of questions my last questions for now—



Mr. DAYS. That is quite all right. I did write these things, Senator.

Senator HATCH. No, no. That is fine, and you are a good writer. You suggested there, though, that *Washington v. Davis* was wrongly decided, and that landmark decision held, of course, that in order to trigger the strict scrutiny standard of review under the equal protection clause, a plaintiff must establish that a government practice or policy with a disparate impact upon minorities was instituted with a discriminatory intent. Only if such intent is shown must the Government have a compelling interest to justify its policy, which was a very difficult standard to meet. In the absence of any showing of discriminatory intent, under *Washington v. Davis* a challenged practice is subject to the rational basis standard of review.

I take it from your article that you believe in a form of—if I could quote it, it would be “heightened scrutiny,” going beyond the rational basis standard for governmental action having a disparate impact on minorities even though no discriminatory intent is found. Is that true?

Mr. DAYS. That is what I said in the article, yes, Senator.

Senator HATCH. I understand from your article that you do not suggest that the Government will always lose, but still this is not only quite a departure from current law, but a very far-reaching one, at least in my view, and I think you would have to admit it is, too.

Mr. DAYS. Yes; you and I have discussed this issue, I think, on many occasions.

Senator HATCH. That is right. In essence, if implemented, it would be a giant step toward the allocation of public services by quotas. Prof. John Hart Ely, for instance, no conservative, put it this way in his book *Democracy and Distrust*:

To require in the absence of proof of intentional discrimination that governmental action be more nearly equalized would be to take a step the Court has consistently refused, one of forcing Government officials to determine and take into account the races, and so forth, of everyone who will be affected by a proposed action and juggle it so that the numbers come out about even.

Now, again, if you are confirmed, and I believe you will be, do you intend to ask the Court to reconsider *Washington v. Davis* in favor of the heightened scrutiny approach that you articulated in that particular article?

Mr. DAYS. Senator, I will say about that what I have said about some of the other cases that you have mentioned. That is a very well-established decision. The courts have operated within the confines of that particular rule. I think most lawyers are familiar with its requirements, and my position would be, without binding myself at this point to any future action, that that is not the type of case that if I had it to do all on my own, which is not the situation, as Solicitor General I would not be prepared to challenge.

Now, there may be cases that come up where that issue is presented in a novel and compelling way where I will decide that the Supreme Court should have the opportunity to revisit the issue. But as I said earlier, I will do that with great care and with great caution and deliberation.

Senator HATCH. Well, I thank you. I have a number of other questions, but I will defer them to a little bit later. Thank you.

The CHAIRMAN. Thank you. I will now ask my questions which I have deferred. Let me ask you—it seems to be an appropriate departure point here—you were head of the Civil Rights Division. You have had the opportunity to work with a Solicitor General, Wade McCree. Can you tell this committee, in light of the answers you have given to Senator Hatch, which have been forthcoming—you used the phrase, I think, that these decisions percolate up; they go through the process. One of the places, especially in the last two decisions the Senator asked you about, they will percolate up through, in part, is the Civil Rights Division.

Mr. DAYS. That is correct.

The CHAIRMAN. The person who is going to head the Civil Rights Division has a view, based on what has been written—and I am not totally familiar with it—that would suggest that there may be a lot of percolation. Can you tell this committee, not with that individual, but how your office will view its relationship to the head of the Civil Rights Division in determining what cases are appropriate to challenge, what cases move from persistence to presumption, or presumption to persistence?

Mr. DAYS. The normal relationship is for a litigating division or an agency that is concerned about a particular case to bring that to the attention of the Solicitor General by writing a memorandum saying, if we want to talk about amicus briefs for a moment, there is a case approaching the Supreme Court where we feel that the United States should participate. One of the special roles of the Solicitor General is that he can enter a case in the Supreme Court without the leave of the parties, and this is a position enjoyed by no other litigant before the Supreme Court.

Once that memorandum—let us assume that it came from the Civil Rights Division—arrives on the doorstep of the Solicitor General, there is usually a response prepared by a lawyer within the Solicitor General's office, often trying to find the soft spots in the memorandum coming from the litigating divisions, identifying the implications of one position or another before the Supreme Court, indicating where more information might be necessary.

But I think that one of the most important parts of that process is that the Solicitor General will often look to other agencies within Government to get their views, so that in a case from the Civil Rights Division the practice would be to ask the Civil Division about it. If it happened to involve the prison system, the Bureau of Prisons, through the Criminal Division, would be involved. Other agencies would be involved, and after that canvassing the Solicitor General would be in a position to determine whether the recommendation from the Civil Rights Division was one that could be supported and could be used as the basis for appearing before the Supreme Court. So there is a lot of give and take in that.

The CHAIRMAN. Where does the President fit into this process? A lot of this is policy.

Mr. DAYS. Yes.

The CHAIRMAN. They are very difficult policy decisions, and let us take *Milliken* or *McCleskey*, any of the cases that were mentioned by the Senator.

Mr. DAYS. Yes.

The CHAIRMAN. They involve school desegregation, they involve the death penalty, they involve the most controversial issues. They may involve privacy. There may be cases relating to choice. They involve those issues which are the most fundamentally debated issues relating to social policy. The takings clause—I mean, there is an entirely new jurisprudence that has grown up in academic circles, if not thus far in case law, on how to reread or define with greater precision the takings clause of the fifth amendment. But because of that, there are significant policy judgments that Presidents of the United States have firm views on.

You are the people's lawyer; you are the Court's confidante, if you will, and you are the President's appointee.

Mr. DAYS. Correct.

The CHAIRMAN. How do you mesh that? Let me take a specific case. I will pick something where I don't know the views of the nominee for the Civil Rights Division. Let us say on the issue of the death penalty and on the issue of whether statistical analysis, absent intent, can be looked at by the Court—and let us assume the recommendation comes to you that there is a case coming up that is appropriate legally, and it would be legally appropriate, to challenge the prevailing case law on that issue relating to the death penalty.

Mr. DAYS. Yes.

The CHAIRMAN. It was consistent with your view as a professor, your view as a private citizen, your view as a former head of the Civil Rights Division, but inconsistent with the President's view, the President having very starkly set out his view on the death penalty. I don't know his view on that particular case, but let us assume it was very different.

How do you as a Solicitor General reconcile these four factors: one, your view as you laid it out on *stare decisis*, which essentially is if it mirrors the *Casey* language—it basically says if it has been around a while and it has been relied upon and lower courts have relied upon it and the public has come to assume it is there, then that is something we tend not to tamper with unless there is some extraordinary rationale for doing so.

Mr. DAYS. Correct.

The CHAIRMAN. So you have that factor. The second factor you have is you have a director of a division within the Justice Department who says, no, notwithstanding that, we should challenge it. You have previously-held views that philosophically put you in the camp of saying, yes, that was wrongly decided when decided 2, 5, 7, 10, 12, 15 years ago. And you have a President who says, hey, wait a minute, I like the decision just the way it is; I don't think we should tamper with it; my administration should not be in the role of suggesting that that be overturned.

Go through with me what you have to go through as a Solicitor General in how you resolve what I think is a predictable dilemma every Solicitor General has found himself in at some point—not every one, but it is not an unusual circumstance. But in a few areas where the law is very much either evolving fifth amendment jurisprudence on the takings clause or settled but incredibly con-



troversial on choice and/or the death penalty, how do you deal with that?

Mr. DAYS. Under most circumstances, even in the——

The CHAIRMAN. And I am not asking for a specific ruling on a specific case.

Mr. DAYS. No; I understand that. Even in the areas that you described, in most instances if the system works properly the policy concerns of the President and the administration will be reflected in the recommendations that come to the Solicitor General from the various agencies. And to the extent that those agencies have not canvassed properly what the President's view may be or the administration's view, then often the Solicitor General will say, are you certain that this is consistent with the position, and make certain that if it is a policy matter as opposed to legal matter that that be sorted out.

Now, if we come to the question of what I believe in terms of my legal judgment as opposed to what the President may believe is the correct legal result, my job is to try to explain to the President and the administration—and I will talk about process in a moment—why I have reached the conclusion that I have reached. But as a constitutional matter, the President appears in the document. I don't. Therefore, I think that——

The CHAIRMAN. I want to make it clear now——

Mr. DAYS. Yes.

The CHAIRMAN. And you are responding precisely to my question.

Mr. DAYS. Yes.

The CHAIRMAN. But I want to make it clear for the record what we are both saying here. We are talking about those circumstances where there is not a clear view among constitutional scholars as to precisely what the right answer is. Segregated schools, per se, are wrong. You are not going to find constitutional scholars going back—well, we found a few, but we are not going to find many who suggest that *Brown* should be overturned. What we are talking about here are those cases where everyone acknowledges it is a close call, and ultimately the decision is ironically a policy decision.

Mr. DAYS. Yes.

The CHAIRMAN. I just want to make sure, for the record, we understand.

Mr. DAYS. I think as a constitutional matter, where the President decides that he wants a position taken before the Supreme Court, the Solicitor General should follow that directive. If the Solicitor General disagrees with that particular result, I suppose one alternative is to resign, but I think that most Solicitors General have understood that relationship and have felt that where they could go before the Court and make a respectable argument to the Court——

The CHAIRMAN. That is the point I want to get to.

Mr. DAYS [continuing]. They should do that. Now, insofar as process is concerned, it has not been the tradition, as I understand it, for Presidents to pick up the telephone and call the Solicitor General. I am very comfortable with an approach that was arrived at during the Carter administration. There was a memorandum prepared by the Office of Legal Counsel to the Attorney General on the relationship between the Solicitor General and the Attorney

General, and basically it described the need for independence both in order to increase the likelihood that legal opinions would be arrived at free of unrelated policy considerations, and secondly to make certain that the reputation of the Solicitor General for fair dealing and candor before the Court was not in some way compromised.

What the memorandum suggests is that the Solicitor General be in most instances relied upon to make the distinction between policy and law, and to identify those situations where there is no clear answer, in his legal judgment. Under those circumstances, as the memorandum sets out, the Solicitor General should call the Attorney General and say, I need some policy guidance on this, we are in equipoise.

I remember a case during the Carter administration that had to do with whether supersonic transports could land in New York airports, and Attorney General Bell said, I can argue it either way you want, just tell me what the policy is; there are respectable arguments on both sides. But I think the memorandum suggests an approach that protects the substance of that independence, and also the appearance of that independence that is very important to the success of not only the Solicitor General, but of the administration before the Court.

I think most Presidents have recognized that, in the long term, leaving the Solicitor General free to make judgments will work out to the benefit of the administration, not to the detriment. I have discussed this memorandum with Attorney General Reno——

The CHAIRMAN. That was my next question.

Mr. DAYS [continuing]. And she is perfectly comfortable with the approach that it suggests, and I assume that that is one that we will follow in this administration.

The CHAIRMAN. Well, I am delighted to hear you say that because we both have been around long enough, as everyone on this committee has, to know that the views of Presidents, Democrat and Republican, are not necessarily reflected by their third- and fourth-tier appointees. Theoretically, that is how it works, but we know how the appointments occur.

Mr. DAYS. Yes.

The CHAIRMAN. The President usually does not—this President, the last President, the six I have served under, do not necessarily go down all the way through, although important positions—the President, I know, personally made a judgment about whether or not you should be the Solicitor General. It is a significant post. I don't know whether the President personally is going to make a decision about the head of the Criminal Division or the head of the Civil Division or the head of the Civil Rights Division. He may very well. It would not be inappropriate for him not to, and it would not be inappropriate for the President, while trying to run an administration, not to be fully cognizant of all the views of each of the people running those departments.

Although my time is not up, I will yield, since I get to stay and turn the lights off. It is one of the nice responsibilities of this job. I will yield now to my colleague and not use all my time, but let me ask unanimous consent that the memorandum I believe you are referring, the memorandum opinion for the Attorney General, "Role

of the Solicitor General," dated September 29, 1977, be entered in the record. That is what we are talking about, right?

Mr. DAYS. That is correct. Perhaps we can provide you with an official version of that. That is a version that I was using for my own purposes.

The CHAIRMAN. Well, why don't we do that. I will ask unanimous consent that the official version be put in, again not binding you with precision to what it says, but it gives us and will give everyone on the committee, as well as the Senators who review the record, some sense of how you would approach what we all acknowledge is an incredibly difficult dilemma for a Solicitor General.

[EDITOR'S NOTE: The memorandum referred to above was not available at press time.]

Mr. DAYS. I also know, Senator, if I may add this, that the President, as a lawyer and has someone who has followed these issues, understands the importance of the independence of the Solicitor General, and I am confident that when he appointed me he understood that to be the arrangement.

The CHAIRMAN. I am confident of that as well, I really am. The dilemma comes only, as far as I am concerned, in what you source and what weight you give to the sources in making your decision to exercise your independent judgment.

Mr. DAYS. Precisely right.

The CHAIRMAN. And you have answered that to my satisfaction and I think it is important for it to be in the record.

Mr. DAYS. Thank you.

The CHAIRMAN. I yield to Senator Thurmond.

#### OPENING STATEMENT OF SENATOR THURMOND

Senator THURMOND. Thank you, Mr. Chairman. Professor Days, we are glad to have you here and we wish you well in your new task.

Mr. DAYS. Thank you, Senator.

Senator THURMOND. If confirmed as Solicitor General, how will you resolve conflicts between your own sense of justice and the position you will advocate on behalf of the Government? Specifically, if directed, will you argue the constitutionality of an issue even though you may believe it indefensible under the Constitution?

Mr. DAYS. Senator, let me say that this is not the first time that I have confronted the problem that you have outlined in your question. Before I became the head of the Civil Rights Division, I was a lawyer in private practice employed by a civil rights organization and I represented clients and I took positions that I thought were in the best interests of my clients.

When I came to the Justice Department and became the Assistant Attorney General for Civil Rights, I realized that I was putting on a new hat and I think I was able successfully to distinguish between positions I would have taken had I been back at the Legal Defense Fund from the positions that I was required to take as a lawyer for the United States, for all the people of the United States, and I will carry out my responsibilities with the same sentiments in mind, with the same standards.

But your question suggested that I would be faced with a situation where I would have to get up before the Supreme Court and



make a legal argument that I felt was indefensible. I hope that I don't have to confront that. I think that there are very few issues that are so starkly put, but I think that as an officer of the Court and as the Solicitor General, I would have to decline to take an indefensible position before the Supreme Court, and I think that this is something that has happened in other administrations and Solicitor Generals have resorted to one technique that I think is available to lawyers—

Senator THURMOND. You could recuse yourself, if necessary?

Mr. DAYS. That is precisely the case. I mentioned Simon Sobeloff who took that position in a case that he was involved in and I think was recognized for his independence in that regard.

Senator THURMOND. Professor Days, there has been much discussion and debate concerning President Clinton's proposal to raise taxes on the American people. It is appropriate for there to be spirited discourse on the issue of taxes because, as elected officials, we are directly accountable to the American people.

For over 200 years, consent to taxation has come through the ballot box. A resolution adopted by the Stamp Act Congress in 1765 protesting excise duties imposed by Great Britain on the colonists stated, "It is inseparably essential to the freedom of a people that no taxes be imposed on them but with their own consent given personally by their representatives."

Yet, this fundamental principle was turned on its head in the *Missouri v. Jenkins* decision, which I presume you are familiar with—

Mr. DAYS. Yes, I am, Senator.

Senator THURMOND [continuing]. Handed down by the Supreme Court in 1990. Essentially, the *Jenkins* decision grants power to the Federal courts to order new taxes or tax increases to carry out a judicial remedy. It is my firm belief that the American people lack adequate protection when they are subject to taxation by unelected life-tenured Federal judges. As James Madison stated in Federalist No. 48, the legislative branch alone has access to the pockets of the people.

I introduced legislation to alter this decision to preclude the lower Federal courts from issuing any order or decrees requiring the imposition of any new tax or to increase any existing tax or tax rates. I firmly believe that the Constitution explicitly reserves the power to tax as a legislative function where representatives are accountable for unnecessary taxes. This matter has never been acted on by the Congress yet, but I hope it will be.

My question to you is two-fold. First, do you believe there is sound constitutional authority for the American people to be exposed to taxation unless it is imposed by proper legislative authority? And, second, as Solicitor General, if given the opportunity, will you request the Supreme Court to carefully consider the matter of judicial taxation and affirm the proposition that a legislative body is the appropriate institution of Government to levy taxes?

Mr. DAYS. Senator, I am familiar with *Missouri v. Jenkins*. I, of course, share your sentiment about the importance of having the people determine how and when they are going to be taxed, but I also want to make clear that we have something called the 14th amendment and we give to our judiciary the responsibility for hear-

ing cases that arise under that provision of the Constitution and devising adequate remedies where a violation has been established.

I think that in the *Missouri v. Jenkins* case, what the lower courts determined was that there had been a constitutional violation and the question became one of what should be the appropriate remedy. Now, taxes were imposed by the court through the defendants in that case, who had been found in a court of law to have violated the Constitution. But I think that the Supreme Court basically got it right that to the extent that Federal courts can avoid arriving at the point where legislative officials or elected officials have to be directed to raise taxes in order to remedy a violation, they ought to explore a number of remedies short of that point. In other words, that would be regarded as an extreme remedy in most instances, and I think the balance was struck properly by the Supreme Court in looking at that issue that, as a matter of course, Federal courts should not look to the taxing power every time they find that there has been a violation. But there are some situations where recourse to the fisc may be necessary to ensure that people who have had their rights violated, rights protected by the Constitution, that the remedies are adequate to correct that violation.

Senator THURMOND. I presume that you would generally agree that taxes should not be imposed or increased unless it is done by a proper legislative body.

Mr. DAYS. That is correct, Senator.

Senator THURMOND. Professor Days, in *U.S. v. Leon* the Supreme Court established a good-faith exception to the exclusionary rule. There was an effort in the Congress to codify this ruling and also to extend this exception to warrantless searches. I don't believe this has ever been acted upon yet. Please discuss the exclusionary rule generally and whether you support extending the good-faith exception to warrantless searches.

Mr. DAYS. Senator, the exclusionary rule has been utilized by the courts to, I think, in large part ensure that people who are charged with offenses are not convicted based upon practices that violate our basic rules of decency and fair play and respect for constitutional principles. It is a concern with a true-seeking process, but I think it is also a concern with ensuring that our judicial system not only does justice, in fact, but continues to enjoy an appearance of fairness in the process.

Now, there have been over the years, as you well know, Senator, changes in the way that the Supreme Court has viewed the exclusionary rule and the *Leon* case is one where I think that the Court was concerned about situations where officers acting in good faith went to a court and got search warrants, only to find out after the entire process had been completed that there was not an adequate basis for the warrant; there was not probable cause.

I certainly understand why the Court felt that that was necessary in order to achieve effective law enforcement. I join the Attorney General and the President in my commitment to the idea that law enforcement ought to be effective and that criminals who menace our lives on a day-to-day basis ought to be dealt with very effectively.

But I am concerned at this point—and I don't have a position personally and I certainly can't tell you what my official position would be if you see fit to confirm me, but I am very concerned about an exception that would be given for warrantless searches where there is not a judicial officer involved. Whether my view will change through education within the Government remains to be seen, but that is my personal position.

Senator THURMOND. You understand that two circuit courts of appeal have already approved this? Are you familiar with that?

Mr. DAYS. I must say I am not familiar with the developments at the court of appeals level.

Senator THURMOND. You might want to look into this carefully because it is a very important issue.

Mr. DAYS. Well, I expect that it will be coming to my desk, Senator.

Senator THURMOND. Professor Days, in your speech during the bicentennial of the U.S. Constitution entitled "Living Without the Constitution," you summarized the Supreme Court's decision in *McCleskey v. Kemp* as holding that racial disparities were constitutional, absent discriminatory intent, and then you expressed your disagreement with that conclusion. Would you discuss your views as to whether unconstitutional activity is demonstrated merely by a rate of conviction or death penalties imposed on members of a group which is larger than the proportion of that group in the general population?

Mr. DAYS. Senator, I am familiar with *McCleskey v. Kemp*, and actually it came up in some earlier exchanges that I had with other members of the committee. My concern about the *McCleskey v. Kemp* decision was the extent to which the Court recognized that serious issues were raised by the statistics having to do with the imposition of capital punishment, but did not conclude that they rose to the level of establishing a case where intent has to be shown.

I think that the law is well established that in order to prove a constitutional violation of the 14th amendment, one has to show discriminatory intent. So I am not so upset about the application of that particular standard, but I think reasonable people can disagree with respect to the facts of the *McCleskey* case, and that is really what I was getting at. To what extent do the statistics have to exist before one can conclude that there has been a violation?

Certainly, the Supreme Court in some other cases has shown that statistics can achieve the level of being a violation of the Constitution. But my view is, no, there is not an automatic violation of the 14th amendment where one shows disproportionate impact or disparate impact.

Senator THURMOND. I presume you generally agree that a capital case should be tried on the facts and not on statistics.

Mr. DAYS. I agree with that, but I also think that where it is evident in a system that there has been systematic discrimination that the Court has in the past, and I hope will in the future, identify that as a violation of the Constitution. We have had a number of cases developed over the years having to do with discrimination in the convening of a jury, and I think the Court has said that there are some circumstances where the statistics rise to the level



where they cannot be ignored; that they show that something is wrong in the way that that system operates. And those particular problems have to be addressed in some cases in specific prosecutions. They cannot be dealt with in a generalized way.

Senator THURMOND. The facts of each case, though, would have to determine the trial, wouldn't it?

Mr. DAYS. Yes, absolutely.

Senator THURMOND. Thank you very much.

Mr. DAYS. Yes.

Senator THURMOND. I believe my time is up, and thank you very much.

Mr. DAYS. Thank you, Senator.

Senator THURMOND. Thank you, Mr. Chairman.

The CHAIRMAN. Let me suggest how I would like to proceed the remainder of the day. I will now shortly yield to the Senator from California, whom I will ask, and she has graciously consented, to Chair this proceeding until roughly 12:30, which means that the Senator from California and the Senator from Wyoming and possibly the Senator from Iowa, who has indicated he will try to come back, will have questions.

I don't think there are many more questioners, professor, but I know that the distinguished Senator from Utah has some more questions, and maybe others. So we will, at 12:30, recess until 2. I don't expect this to go very long. You have been very forthcoming in your answers and I expect we will be able to finish early afternoon, but we will recess from 12:30, or whenever the Chair concludes it is appropriate to recess, until 2.

I am going to absent myself because Foreign Minister Kozyrev is here and I promised I would meet with him on Bosnia and a few other little things during this period. So I will be gone for the remainder of your stay this morning, but be back at 2 to reconvene the hearing. With that, why don't I invite the Senator from California if she wishes to assume the Chair either here or from wherever she sits, whichever is most comfortable. It is her turn to question and then we will go to the Senator from Wyoming.

#### OPENING STATEMENT OF SENATOR FEINSTEIN

Senator FEINSTEIN [presiding]. Thank you very much, Mr. Chairman. Good morning, Mr. Days.

Mr. DAYS. Hello, Senator.

Senator FEINSTEIN. I am very happy to be here and have an opportunity to vote for you. I think your qualifications are excellent and I really look forward to watching you as Solicitor General. Having said that, I also recognize that we have some points of difference. I wanted to use this opportunity to make clear to you what I believe, at least, are the feelings of the people of my State, California, and the first of those, of course, is the death penalty. You discussed that with Senator Cohen and Senator Thurmond.

I am sure you know that Californians have voted to restore the death penalty and that we hope in this crime bill to be able to solve the habeas issue in a tight way that will allow justice to move on rapidly. I am wondering, if you have considered the habeas corpus issue, if you have any thoughts on that matter.

Mr. DAYS. Thank you, Senator. I have not considered the legislation that is being worked on in the Congress at this point, but I do have a position on habeas corpus. The position is that I believe in finality; that is, there should not be multiple reviews of cases involving in some cases scores of judges before the process ends. But I am also concerned about fairness, and I think that if a proper balance can be achieved between those two objectives, I think the Nation will be well served.

It is my sense that the law as the Supreme Court has been looking at it up to this point really aims in that direction. It is really up to the Congress to determine whether it is worked out quite to the degree that you say the American people would like to see it work out.

I understand the concern about multiple appeals, but I also am concerned about some of the horrendous situations that have been brought to my attention where there has been inadequate assistance of counsel or where there have been some other things that have occurred that I think really bring shame on our judicial system, and we should do everything we can to avoid that particular problem.

I remember, for example, a case where a judge stepped down from the bench and became the prosecution's chief witness against a defendant, or where a defense counsel at the end who had been appointed by the court said, before you stands a worthless man, my client; I hate my client. And these people were convicted in some cases of capital murder, or a situation where a man, a black man, was convicted of capital murder and it was found out later that the prosecutor had kept from the defense lawyer the fact that there were three eyewitnesses that said that the assailant was white.

So I think that we have to be very concerned, as I know you agree, with not moving in the direction of finality so far that we lose this important consideration of fairness. And I think the Attorney General spoke during her confirmation hearing about that and I certainly share her views in that respect.

Senator FEINSTEIN. Let me just see if your views are similar in that regard. I believe what the Attorney General said was that whether the time provided by the legislation would be 6 months, 12 months, 18 months was not of substantial concern to her as long as there were provisions which provided for competency of counsel.

Mr. DAYS. Yes, that is correct.

Senator FEINSTEIN. So you would share that view?

Mr. DAYS. Well, as I said, I don't know the intricacies of the bill, but my position on habeas is basically that.

Senator FEINSTEIN. All right, thank you very much. A second question: I believe that in the fall term the Supreme Court will hear a case concerning standards for sexual harassment claims under existing Federal law, and as Solicitor General you would be responsible for briefing and arguing that case. Without prejudicing the issue, could you tell us what you see at stake in that case and how current law could be affected by it?

Mr. DAYS. It is my understanding that the Government is going to file a brief in that case, or has filed a brief in that case, so I don't want to get into the details of that. I haven't obviously been

in a position to do anything official as Solicitor General, but let me talk about the issue generally of sexual harassment.

I think it is one of the most serious issues that we have in our society today. I think it is the type of thing that stands between women and success in the workplace, success in a number of other endeavors that they as full citizens of this society are entitled to.

I have watched the courts, the Federal courts, deal with the issue of sexual harassment over the years and it was not a very pretty picture, if I can put it that way. For the longest time, Federal courts just didn't get it, if I may use that phrase. They saw title VII of the Civil Rights Act as not including matters of sexual harassment.

Slowly, there was a dawning on the courts that this was really a problem, and then we got to the question of, well, is there a difference between the so-called quid pro quo sexual harassment or hostile-environment sexual harassment. I think the Supreme Court had made clear that they are both violations of the law, they are both insults to the dignity of women.

As a general matter, I want to do all I can to ensure that sexual harassment is dealt with effectively by the Government. Obviously, as Solicitor General, as I mentioned earlier perhaps before you came in, I am not the philosopher king; I am not given the authority to sit in my office and decide in some abstract way what I am going to do. But I have a feeling, given the nature of this administration, that there will be strong support for measures to provide greater protection for women in this regard.

Senator FEINSTEIN. Thank you very much. I appreciate that. Just one final point. I am absolutely convinced that this Nation stands on a precipice with respect to crime. It is escalating daily in people's consciousness and their sense of fear and their ability to survive in many settings is very much affected by it.

I would hope that as Solicitor General you would be just as firm as you possibly can to see that the laws of our Nation are enforced and that we set a kind of strong tone backed up by cases to support these laws. I have just become increasingly concerned because all across the Nation, violent crime in particular is increasing rather dramatically, and I would certainly welcome any thoughts that you might care to make to this committee at this time on the subject.

Mr. DAYS. Senator, I think all of us have found ourselves in a society where crime poses threats to all of us, to the people we love and to communities in which we live, and I think we must do something about that. There has to be a very firm and predictable response to crime in order to deal with the types of depredations that occur on a minute-by-minute basis in many communities in this country.

But I also want to say that crime is not something that exists in isolation. I think that there are things that can be done, and indeed the Attorney General talked about them during her confirmation hearing, that may help, along with vigorous enforcement of criminal laws, to begin moving us in a different direction, to try to remove the extent to which people feel that they are prisoners in their own homes and cannot go out, particularly the elderly, because of the degree of crime and criminal activity on the streets.



So I share with you the concern about crime and the need for vigorous enforcement, but I want to also do what I can as Solicitor General to support the Attorney General's view about other alternatives, ways that we can work, along with vigorous enforcement, to deal with the problem.

Senator FEINSTEIN. Thank you very much, Mr. Days.

Mr. DAYS. Thank you.

Senator FEINSTEIN. The distinguished Senator Simpson.

#### OPENING STATEMENT OF SENATOR SIMPSON

Senator SIMPSON. Thank you, Madam Chairwoman. We ought to take over the committee. There is no one else here. Here is our chance. We have been waiting. [Laughter.]

Well, it is a great privilege to serve with you, Senator Feinstein, and I know, too, that you have a great interest in immigration issues—

Senator FEINSTEIN. Yes, that is right.

Senator SIMPSON [continuing]. Not only crime as a significant part of your interest, but what are we going to do with that issue, and I appreciate your assistance in that and enjoy working with you since I first met you when you were mayor and I was the chairman of the Subcommittee on Immigration and Refugee Policy. I remember that. That was some 10 years ago, and it is great to work with you.

Well, now, Professor Days, how are you?

Mr. DAYS. I am fine, Senator. It is good to see you.

Senator SIMPSON. It is good to see you because I know you and I recall working with you during the Carter administration when I first came here in 1979, and I remember some spirited conversations with you. You remember those.

Mr. DAYS. Indeed, I do.

Senator SIMPSON. You have great energy and spirit, and I admire your passion in the pursuit of your causes, but I think the thing that always attracted me to you is that you have an ability to be terribly forceful and keep your head and keep your steadiness and keep your humor. I always admired that greatly. I guess Kipling—what was it, keep your head when all about you are losing theirs and blaming it on you? I know that feeling. So, that is an admiration for you as a steady, thoughtful person.

You will do a tremendous job here. Your predecessors—I am just looking at the list of the ones I have known. Kenneth Starr, I think, did an excellent job. Charles Fried—I didn't know him that well; Rex Lee. And, of course, the one I knew best was Wade McCree. We almost had too much fun together. We would go down to Milt Kronheim's Warehouse and have lunch and other exotic things which are beyond the pale here. But he was a rich man who had been through terrible prejudice growing up in this community as a young boy, and then came on to do his work without any feeling of retribution or victimization. He just did his work and, as you know him, he was a very special man and left us all too soon.

I know you are going to be deeply involved in the issues of immigration. That is going to come to the fore, the issues of things that you have been deeply interested in, and let me ask you about that because you have already said that you could sequester yourself

from previous views and I believe that, I do, knowing you as I have come to know you.

But I want to ask about a group. There is a group called Americas Watch and they recently released a report entitled "Frontier Injustice" which is said to document hundreds of brutality complaints against the U.S. Border Patrol agents. Now, in my long work here I have found that that has always been the case; there have been complaints of that.

There was an attempt which I thwarted to allow local law enforcement officials to enforce Federal immigration laws. I said, no, I am not going to have any part of that. Certainly, there are abuses in every agency of government in every situation, but it seemed to me that most of these complaints came from groups that didn't want really any immigration reform anyway, those who always said, well, why don't you just enforce existing law and have more enforcement. Then you say, well, we are going to have more enforcement, but we are going to enforce this law. Well, no, that is not what we wanted. Then I say, why don't you just say you don't want anything; that will ease everything up and save us so much pain.

So, obviously, you are going to be called upon to defend the actions of the Justice Department, and I think the Attorney General is superb and I think she is going to make a superb selection for INS Commissioner. You may be on the inner loop. I am not on the inner loop anymore, but I do know the two or three names that I hear that are in consideration and one of them would be superb, the other two would be also very capable.

But you are going to be called upon to defend the actions of the Justice Department in processing of these complaints, if they come, or to defend the actions of the Border Patrol. Will your continued membership in Americas Watch or in the Lawyers Committee for Civil Rights Under Law, or any groups that you may be connected with in any way influence, or worse in this town, appear to influence your judgment and your ability to defend the Justice Department's actions?

Mr. DAYS. The short answer is no, Senator, but let me add a bit. Because I don't want there to be any perception of conflict of interest, I plan to resign from every organization I belong to so there would be no question of whether I am operating as a member of the Lawyers Committee or the Americas Watch organization.

When I came to Washington in 1977, I did the same thing and I found it saved me a great number of problems in that respect. I remember being told when I went to the White House by a young lawyer there that I had a first amendment right of association, and he was very concerned that I was dropping out of all these organizations. And I explained to him that I understood that fully, but felt that it was consistent with the type of job that I wanted to do, and I have that same feeling about this job.

Senator SIMPSON. Well, I would certainly believe that. Let me ask you another, Drew. It is with regard to one of your primary responsibilities, and I think you explained that very remarkably that your duty is to represent the United States of America.

Mr. DAYS. That is correct.

Senator SIMPSON. That is your client.

Mr. DAYS. That is correct.

Senator SIMPSON. I remember your work with Judge Bell—I think it was in Judge Bell's presence where I first met you—and how he handled things with great, good common sense, knotty problems, draconian decisions, and how he did that with good humor, too. I can hear him on that supersonic case. I think I remember that where he said, well, just aim me in the right direction because I can give a great argument on either side, and he did.

But the Clinton administration recently went through their own anguish with regard to the Haitian issue because during the campaign, and this is not a partisan statement, President Clinton, then a candidate, said that he was going to change that. Yet, I think those of us who have been close to the scene on that issue, Democrat and Republican alike, knew that there probably would be very little way to change that without an extraordinary disruptive movement which, based on freedom, would turn into tragedy, and there are many other reasons.

But President Clinton heard his advisers and decided to do nothing, or at least to let people know what he intended to do and get the signal out. Now, they have appeared before the court to defend the policy of interdiction of Haitians, some fleeing poverty, some fleeing strife, some fleeing a cruel and inept government, some fleeing literally as asylees, I am sure, indeed. So there was a result of reaffirming the previous Bush administration policy.

Again, some of the things you have been involved in before—I think there was a coauthoring of a report in 1983 on human rights in Haiti with the Lawyers Committee for International Human Rights and the International League for Human Rights. Those organizations are frequently very critical of U.S. immigration and refugee policy under any administration.

Do you feel, too, here that—and you have indicated that you would then discontinue your membership in those organizations and would be able to defend the Clinton administration's present interdiction policy with regard to Haiti.

Mr. DAYS. Senator, there is a bit more complexity on that particular issue because I actually was one of the signers of briefs in the Haitian litigation on behalf of the plaintiffs. So my practice will be, if I am confirmed, to recuse myself from any matters that grow out of that particular litigation and the matter will be handled by someone else in the office.

Senator SIMPSON. That would take care of that very well, wouldn't it?

Mr. DAYS. I hope so.

Senator SIMPSON. I think it would. Let me just ask you, I am sure you have noted the interesting increased awareness with regard to the failure of our asylum policies, especially with regard to our ports of entry.

Mr. DAYS. Yes.

Senator SIMPSON. Senator Kennedy is the chairman of the subcommittee, I am the ranking member, and Senator Simon. The three of us are involved in this effort. We will have a hearing. The Attorney General will present the administration's position, but this issue of summary exclusion, as it is called, where people have simply destroyed their documents and then, knowing we have no



detention facilities, knowing we have no proper procedures for hearings, then simply are released or just walk out of JFK into the street and get a cab and we never know where they went or who they are—we know who they are, but we do not know where they go, and then 50 to 60 percent never show up for the hearing, and these things are disturbing to people.

Do you have a view on that, on summary exclusion? Does that sound offensive to have an expedited procedure with a special type of hearing officer, with special procedures, to simply at that location just turn them around and put them on an aircraft and send them back if they do not meet the test of asylum?

Mr. DAYS. Senator, I am not really in a position to say exactly how I feel about that. I haven't thought about it carefully. I think there is obviously a legitimate concern of the United States with doing something effective on this issue, but I am also concerned about there being adherence to standards of due process that I think all of us cherish in this country.

Senator SIMPSON. I would ask you—and knowing you as I do, I think you would do this—take a good look at the issues of how much due process we give to certain people in these situations. I think you might find it is more due process than we give to American citizens—the layers of procedures, the layers of appeal, the way people have learned to gimmick the system. Would you do that?

Mr. DAYS. I will, Senator. I am sure that this is the type of issue that will come before me over the next few years.

Senator SIMPSON. It surely will. A final one: You know the issue of immigration reform. You have watched it. Employer sanctions are a very important part of it. Democrats and Republicans alike, and Peter Rodino who was a true civil libertarian—do you have any feeling about the issue of employer sanctions as to whether that is an effective procedure or not?

Mr. DAYS. I am not in a position to really say, Senator.

Senator SIMPSON. That is a good answer, but I thought I would throw it in there anyway. Well, I wish you well and I am certainly going to support you because I think you will do a splendid job and you will bring great honor to the office.

Mr. DAYS. Thank you very much, Senator.

Senator SIMPSON. It is nice to see you again.

Mr. DAYS. The feeling is mutual.

Senator SIMPSON. Thank you, Madam Chairman.

Senator FEINSTEIN. Thank you very much, Senator. We are awaiting Senator Grassley. If he is not here, the suggestion is that we take a 5-minute break, if that is agreeable, and then hopefully you can take your family to a nice lunch.

Mr. DAYS. Thank you.

Senator FEINSTEIN. So we will return in 5 minutes. Thank you.  
[Recess.]

Senator FEINSTEIN. The committee will reconvene.

Senator Grassley, I believe you are up.

#### OPENING STATEMENT OF SENATOR GRASSLEY

Senator GRASSLEY. Thank you, Madam Chair. Like I told Webster Hubbell yesterday, this is just like I tell the graduating kids

at high school, I am the last thing between them and their diploma. I am probably the last thing between you and your getting out of here, and what looks to me like getting out successfully as well. Thank you very much, too, for coming to my office to visit with me as you did.

One of the most important duties of the Solicitor General is to defend the constitutionality of congressional enactments in major appellate cases. In the previous administration, the Solicitor General argued that the Justice Department should defend the constitutionality of the *qui tam* provisions of the False Claims Act. The act, of course, allows private parties with knowledge of fraud on taxpayers to sue in the name of the United States in exchange for a portion of the Government's recovery.

These were my amendments; they were passed in 1986. Since then, nearly \$500 million has been brought back into the Treasury through *qui tam*; \$250 million recovered in just three settlements last year. So, of course, I don't need to tell you I am strongly convinced of the constitutionality of *qui tam*.

To date, I have been unable to convince the Attorney General's office to advocate that position because of internal disagreements between the Solicitor General and the Office of Legal Counsel, which argued that *qui tam* was an unconstitutional threat to executive power, despite contrary decisions by every court that has addressed the issue. Thus, the Department's current position on the constitutionality of *qui tam*, it is my understanding, is one of neutrality.

I discussed the issue with Attorney General Reno during her confirmation hearings and she said that her reaction is that *qui tam* is constitutional. Do you agree that the *qui tam* provisions of the False Claims Act are constitutional?

Mr. DAYS. Senator, I haven't studied it carefully, but let me say that I know that this statute in one form or another has been on the books since after the Civil War, and its objective then and its objective now is to make certain that the taxpayers' money is protected against fraud and abuse by those who contract with the Federal Government. So I approach this particular statute with the strong presumption of its constitutionality, and obviously if the issue comes before me, I will give it much more deliberation and care, but I start with that presumption.

Senator GRASSLEY. A more general question is whether or not you feel Congress can deputize private citizens with knowledge of fraud to file suits on behalf of the United States.

Mr. DAYS. I am not certain I have the answer to that right now, but it is certainly something that I will have to look at.

Senator GRASSLEY. Would you—

Mr. DAYS. Certainly, the objective is very consistent with the spirit of the statute since its origins over a century ago.

Senator GRASSLEY. I wonder if I could ask you, then, would you at least agree that a mechanism which has been employed by Congress since the 1820's to supplement executive branch enforcement is probably constitutional.

Mr. DAYS. Senator, I will go back to my earlier answer, the strong presumption of constitutionality, and I will have to confront it when it comes up through the ordinary course to my attention.

Senator GRASSLEY. If you find that it is constitutional, are you going to advocate that position in the courts?

Mr. DAYS. Well, Senator, again, the practice of the Solicitor General is to defend acts of Congress before the Supreme Court. In those rare instances where the claim is that there is a conflict between the executive branch and the Congress on matters of separation of powers, the Solicitor General has varied from that otherwise very regular course, and I think that that issue will come up perhaps in this context and I can't prejudge that.

I know that if the Government decides—if the Solicitor General decides that there is not going to be representation of the Congress with respect to an act of Congress, notice has to be provided so that Congress can make certain that its own lawyers are there and, in fact, I am looking forward with some fascination if I am confirmed appearing in the Supreme Court along with my friend of many years, Michael Davidson, who, as you know, represents your interests. I would like to think that we would be standing side by side in most instances, but there may be occasions where we will be on opposite sides of the case.

Senator GRASSLEY. Well, if you are there defending the constitutionality, he won't have to be.

Mr. DAYS. Well, I think that even there sometimes Michael has found reasons to provide a different perspective for the Senate before the Court.

Senator GRASSLEY. On another issue dealing with the first amendment and public funding, I was pleasantly surprised to read that your President and my President's Justice Department is appealing the district court's decision in *Finley v. National Endowment of the Arts* that restrictions on funding of art which do not satisfy a standard of decency are unconstitutional. I think the Department's decision reflects a sound understanding of the constitutional rights of taxpayers. I expect the administration recognizes that, though it may not agree as a matter of policy with limitations on taxpayer funding of obscene art or abortion counseling, the taxpayers have a right to say through their elected representatives what their taxes can be spent on.

Do you foresee any change in the Department's position on this issue?

Mr. DAYS. Well, Senator, obviously I wasn't involved in the decisionmaking process when the Government decided to appeal the *Finley* case, but as I understand the case at least at this point, it raises some significant procedural considerations, namely to what extent did the chairman of the National Endowment, in fact, impose certain standards in the awarding of grants to artists. I think there are some real procedural questions about whether the rule was invoked that Congress authorized the chairman to invoke, and if so whether, in fact, there was the application of that particular standard.

I think the Government's position at this point, as I understand it, is that the issue was not properly presented in the lower court. But if, in fact, it turns out to be so, then the Government will have to take a clear position on the merits as it goes up perhaps to the Supreme Court, but I can't express any judgment on the merits at this point.



Senator GRASSLEY. I want to quote from *Rust v. Sullivan* and ask if you would agree with the majority that the Government, when it places such restrictions on the use of Federal funds, "has not discriminated on the basis of viewpoint. It has merely chosen to fund one activity to the exclusion of the other."

Mr. DAYS. I think that that principle has clearly been established by *Rust v. Sullivan*, and it has come up, as you well know, in the *Finley* case. It seems to me that, as the Government has indicated in its brief on appeal, it is not clear that *Rust v. Sullivan* is properly raised in the case, and there is also the harder question of the extent to which *Rust v. Sullivan* intended to leave out of its otherwise flat rule matters having to do with the arts. There was a discussion of universities and some other contexts, and I think that in a properly presented case that is going to be a very important issue.

Senator GRASSLEY. It seems to me that that just about has to stand and the principle that Congress had behind *Finley* somewhat stands. If we don't, Congress would not be able to place any restrictions on the expenditure of public funds on racist or sexist art or educational materials.

Mr. DAYS. Well, I think that certainly there have to be situations where the Government can make distinctions in awarding grants. I think, for example, that it would be very hard for people to argue that the Government couldn't turn the funding of a grant for a work of art or indeed of some other type of creation that was obscene and was going to be directed to an audience of children.

In other words, it seems to me that no one can quarrel with the proposition that under those circumstances—and indeed there are others, but I wanted to place a very stark before you. I don't see how anybody could quarrel on constitutional or other grounds with the decision not to provide a grant under those circumstances. Why would the Government want to promote pornography or obscenity where it is going to reach a group of children?

Senator GRASSLEY. Thank you. My last question deals with the issue of civil justice reform. I would just point out that in the past few years, maybe even the past decade, the Solicitor General, as the Nation's top litigator, has taken quite a lead in speaking out about the need for reform of America's civil justice system, and I think we all would agree that in our world's most litigious society this is a very important role and a very important subject of reform.

Could we look to you for continued leadership in the push for reform of our civil justice system?

Mr. DAYS. Absolutely, Senator. I have been involved in those issues as a private citizen and as a law professor, and I hope to continue—I expect to continue in that role as Solicitor General.

Senator GRASSLEY. Without providing not a long list, are there a few ideas or steps you might have in mind?

Mr. DAYS. There are a number of issues that have arisen in this regard. I think that alternative dispute resolution is an area where I don't claim a great deal of expertise, but I would certainly like to work with organizations that are interested in those types of changes and see to what extent we might be successful in reducing litigation and litigiousness.

I also want to be, however, careful that we don't create a two-tiered system of justice and decide that there are some things that are not important enough to have the protections that other types of controversies have. So we have to be very concerned about fairness in that regard. But not so much in my capacity as an advocate before the Supreme Court, but perhaps as a member of the Attorney General's team in this respect, I will be able to help out.

Senator GRASSLEY. I surely appreciate your talking about alternative dispute resolution. I think your advocacy of it, without foreclosing access to the courts, is a very important point and one that I would try to abide by in each of the instances where I have tried to promote alternative dispute resolution.

Thank you very much, Madam Chair. I yield the floor.

Mr. DAYS. Thank you, Senator.

Senator FEINSTEIN. Thank you very much, Senator, and thank you very much, Mr. Days. Time for that lunch. This committee will stand in recess until the hour of 2.

[Whereupon, at 12:31 p.m., a luncheon recess was taken.]

#### AFTERNOON SESSION

Senator HATCH [presiding]. Well, if we could call everybody to order, Senator Biden has asked me to proceed. I have a few more questions that I would like to ask. It is very seldom you get this opportunity to chat with a Solicitor General nominee, let alone somebody I think will make a great Solicitor General, and I am doing this just to make sure that we have a record here that is clear because I have no doubt that you can handle any and all of these questions. So, with your indulgence, if I could just finish some of the questions, I think it might be beneficial.

Mr. DAYS. Absolutely.

Senator HATCH. Professor Days, do you agree with the Supreme Court's holding in *Croson v. City of Richmond* that all racial discrimination by government, including discrimination against whites because of race, is wrongful—

Mr. DAYS. Absolutely.

Senator HATCH [continuing]. As well as discrimination against racial minorities; that they all should be judged by the same standards of strict scrutiny under the equal protection clause?

Mr. DAYS. Yes.

Senator HATCH. I believe that the Court got it right and that "equal" really does mean "equal" and no one's rights should be higher or lower than anybody else's. Well, I am pleased to hear that.

Just a couple of things on criminal law. As you know, the exclusionary rule is a judicially created rule which bars the use of illegally obtained evidence at trial. In 1984, however, the Supreme Court limited the scope of the rule in *U.S. v. Leon*. The *Leon* decision held that the exclusionary rule does not bar the use of evidence seized by officers acting in objectively reasonable reliance on a search warrant. Do you agree with that decision?

Mr. DAYS. I think it makes a lot of sense, given the problems that law enforcement officers have, and I think the fact that they go to a judge and get a warrant indicates good faith and I think

that there is nothing particularly to be gained by throwing out convictions that are based upon that type of good-faith reliance.

Senator HATCH. Well, thank you. I hope that the Clinton administration will continue to support the extension of the commonsense approach of the *Leon* decision to cases involving warrantless searches as well. That is where the police officer has an objectively reasonable belief that his or her search is lawful.

Now, I have to say the prior two administrations supported that approach and that position. Indeed, this extension has already occurred in the fifth and the eleventh circuits, and in the case of *U.S. v. Williams* in the fifth circuit, just to cite one case, back in 1980. So I hope you will consider that.

Mr. DAYS. Well, I certainly will consider it. I expressed my concern for the absence of a judicial officer in the process, but obviously it is something that I will look at.

Senator HATCH. OK; with regard to the *Miranda* decision, I also hope that the Clinton administration will support tough law enforcement principles in the position it takes in the courts. The existing rules, for instance, governing the question of suspects by law enforcement are based on the Supreme Court's controversial 5-to-4 decision, of course, in *Miranda v. Arizona* back in 1966.

The Court in *Miranda* promulgated a new set of rules for custodial questioning, a requirement of warnings, a prohibition of questioning unless the suspect affirmatively waives the rights set out as warnings, and a prohibition of questioning if the suspect asks for a lawyer or indicates in any manner that the suspect is unwilling to talk. The Court did not hold that these rules were required by the fifth amendment. In fact, the Supreme Court in the 1974 case of *Michigan v. Tucker* ruled that no violation of the fifth amendment occurs if statements are obtained from a suspect without observing *Miranda's* rules so long as actual coercion is avoided.

Could you give me your opinion of the Court's decision in the *Tucker* case, and do you believe that a violation of *Miranda's* safeguards, absent coercion, would be unconstitutional?

Mr. DAYS. The ultimate determination from a constitutional standpoint is whether we are dealing with an involuntary confession. I think that is the constitutional standard, but I think the Court has woven into the fabric of the law at this point a recognition that the safeguards that *Miranda* provides really guard against people being convicted based upon unreliable information or information that really raises questions about truth.

The Supreme Court most recently looked at the *Miranda* issue in the context of *Stone v. Powell* and concluded that, on habeas, for example, *Miranda* protections should still be of concern on postconviction review. So I think that *Miranda* is really very much a part of our law. There may be changes around the edges, but at this point my inclination would be to think that it would take a very strong situation, a very strong factual situation or change in the context, legal or otherwise, to go directly against *Miranda* and the precedent that was established under that decision.

Senator HATCH. In the 1984 case of *New York v. Quarles*, as in the *Tucker* case, the Court rejected the contention that the absence of warnings implied that compulsory testimony in violation of the fifth amendment has occurred. In this case, the police officers were



approached by a woman who told them that she had just been raped by an armed man. The police apprehended the suspect in a nearby market and the arresting officers asked the suspect where his gun was.

Now, the trial court excluded the defendant's response identifying the location of the weapon because he had not been given the *Miranda* warnings. The Supreme Court reversed a finding that the danger created by the unlocated firearm justified the creation of a public safety exception to *Miranda*. Do you agree with that particular decision, the *Quarles* decision?

Mr. DAYS. Well, I am not intimately familiar with that decision, Senator, but it seems to me——

Senator HATCH. It is just as I have described it.

Mr. DAYS. Yes; in that case, as you have described it, and others, the Supreme Court has tried to bring a rule of reason to bear in looking at those situations where there is a real threat to life or limb and where the niceties of *Miranda* may not be possible, the providing of those types of warnings.

But this is an area where I will initially be guided by the way that people in the Criminal Division and the U.S. attorneys' offices address these issues, and then I will have to make up my mind once the cases come before me. But my basic view is I see an important place for *Miranda* in our criminal law system. I understand that there may be situations where some adjustments in *Miranda* may be necessary, given the factual circumstances.

Senator HATCH. Let me just give one more that I think is an interesting case. In the case of *Oregon v. Elstad*—it is a 1985 case—the Supreme Court held that a confession obtained after prior *Miranda* warnings is not rendered inadmissible on the ground that it is derived from or motivated by an earlier inculpatory statement that was obtained without *Miranda* warnings.

Now, here again the Court expressly rejected the notion that a violation of *Miranda* necessarily entails a violation of the fifth amendment. That decision reflected a willingness on the part of the Court to accept incremental restrictions of *Miranda* and forecasts, at least in my view, a receptivity to further limitations.

If you are familiar with the *Elstad* case——

Mr. DAYS. No; I am not, Senator, but let me reemphasize the fact that I think *Miranda* is a very important decision, and putting on my personal hat because I really can't speak as Solicitor General at this point, I think that we have to exercise great care as a nation in trying to perhaps narrow the types of protections that *Miranda* provides.

Senator HATCH. Do you agree with the Court's 1986 decision—I am not trying to put you on the spot. What I am trying to do is get some idea of where you are on some of these things so that at least we have a good idea of where you might go and what you might be willing to do.

Mr. DAYS. Yes; this is certainly fair game.

Senator HATCH. Well, I hope so. Do you agree with the Court's 1986 decision in *Bowers v. Hardwick*; that is that State laws prohibiting homosexual conduct between consenting adults are constitutional regardless of whether the Court feels such laws are wise? In other words, in your personal capacity as a constitutional

scholar, do you think the Court got it right or wrong in *Bowers v. Hardwick*?

Mr. DAYS. In my personal capacity, I think it got it wrong.

Senator HATCH. Well, if that is so, would you try to overturn the *Bowers v. Hardwick* case?

Mr. DAYS. I am very concerned about the way the Supreme Court dealt with the privacy issue in that case. *Bowers v. Hardwick* is on the books and I think that, again, I will have to see a case before I can make a decision about whether there would be an effort to invite the Court to revisit that question of privacy. But it seems to me that it is an issue that was very recently addressed by the Court and that there may be other circumstances different from the *Bowers v. Hardwick* facts where the question of extending the right of privacy based upon sexual orientation may be presented.

[Pause.]

The CHAIRMAN. Excuse me for the interruption.

Mr. DAYS. That is quite all right.

Senator HATCH. As you know, we have constant—

Mr. DAYS. Yes, I understand.

Senator HATCH [continuing]. Conflicts here and Senator Biden and I work very closely together. He is an excellent chairman and one or the other of us tries to be here, and I just want to thank him for the way he does work with me. It means a lot to me, and I am going to enjoy working with you; I have no doubt about it.

In response to an earlier question from Senator Cohen, you indicated that you opposed Robert Bork's nomination to the Supreme Court because he—

Mr. DAYS. Well, I don't think I admitted it at that point, but as you well know, I did sign a petition that expressed some lack of faith in Professor Bork, one of my former colleagues.

Senator HATCH. You have a right to do that, but as I understood it, you opposed him because he wanted to take the right of privacy in the wrong direction, is what you feel.

Mr. DAYS. My concern was with the very restrictive view that he had of the right to privacy.

Senator HATCH. That is fine as far as I am concerned, but what I want to explore right now is where you think the Court should take this issue with regard to constitutional law and where the Court should be going in this area. For instance, in your view, does this constitutional right to privacy encompass the following activities, or should it encompass them or should it not encompass them. Let me give you an illustration. State laws prohibiting marijuana use in one's home—would it encompass that?

Mr. DAYS. Senator, I can't answer specifically. On this issue, let me say that we have criminal laws that apply in a number of areas with respect to conduct that occurs in people's homes. If you commit a murder inside your home, that doesn't—you can't rely upon the right of privacy.

Senator HATCH. Well, what I think I am trying to do is get what your viewpoints are.

Mr. DAYS. Absolutely.

Senator HATCH. Let us say that somebody asserts a right of privacy that they had a right to obtain, grow and use marijuana with-

in the confines of their own property, their own home. Would you have any difficulties?

Mr. DAYS. My inclination would not be to extend my understanding of the right of privacy to that situation. But, again, we are dealing in a hypothetical situation.

Senator HATCH. So your own personal predilections would be you would not extend it to that situation. How about State laws forbidding prostitution?

Mr. DAYS. My inclination would be with respect to privacy to acknowledge that the State has a right to regulate commercial sexual conduct, but these are issues—even in my private life I haven't explored in great detail the question of prostitution.

Senator HATCH. I am not trying to bind you forever. I just want to know what you are thinking.

Mr. DAYS. No, no. Well, my basic view is this, that I think that the Court got it right in *Griswold v. Connecticut* when it talked about the privacy right as expressed in various ways within our Constitution and indeed as part of American history. And I think it is that basic concept that I am working from and if a case presents itself, I am going to begin with that basic premise in that context for deciding whether the privacy right appropriately extends to one thing or another.

Senator HATCH. But you see what I am pointing out.

Mr. DAYS. Yes.

Senator HATCH. There are a lot of State concerns that some would like to go all the way and apply the privacy right to that you and I and maybe others might think, hey, that is going too far.

Mr. DAYS. Well, I don't think that we have any constitutional right that we view as absolute and prohibit the State from regulating, and that goes for privacy. There are State and governmental concerns that have to be balanced off against the right of privacy.

Senator HATCH. I would be concerned about whether the States can forbid possession of pornography, for instance, in one's home, or State laws forbidding physicians from assisting in suicides.

Mr. DAYS. Yes, I understand.

Senator HATCH. You know, does the law of privacy extend to that? When we get into these Supreme Court nominations, you hear some of our colleagues here say the law of privacy like it is some hallowed right that can't be violated and that States have no rights over, or the Federal Government has no rights over; that anybody who attacks the right to privacy is somebody who shouldn't sit on the Court.

I mean, as you can see, there are some pretty good reasons to limit the right of privacy—

Mr. DAYS. Yes, exactly.

Senator HATCH [continuing]. And I am just giving you some. State laws forbidding euthanasia even of consulting adults—you know, these are the kinds of things that—State laws prohibiting infanticide of newborn children with severe birth defects. I mean, these are illustrations, it seems to me. In my view, they are all issues for the people to resolve in their respective States and these are not issues in which the judiciary should constrain the elected branches of government under our constitutional system of the separation of powers.



I think the point I am making here is I have heard this right of privacy bandied about here by certain people on the committee as though these penumbras are inviolate, you know, and the problem with this right is that you cannot confine the contours of the right. You know, I am very concerned about those types of interpretations of constitutional law that are very simplistic, and you have indicated here that you would not approach it in a simplistic fashion—

Mr. DAYS. That is correct.

Senator HATCH [continuing]. That each instance has to be looked at and that there may be many areas where the law of privacy is not absolute, where it cannot be applied, where the State does have a right and where it is not some inviolate law, as some of our more liberal colleagues seem to think it is.

Mr. DAYS. Yes; well, that is true of other provisions of the Constitution.

Senator HATCH. Of course, it is. You and I agree.

Mr. DAYS. When we talk about liberty, we know that the contours are not there for us to see in neon signs.

Senator HATCH. That is right.

Mr. DAYS. We have to work our way through those questions.

Senator HATCH. And the same thing with first amendment rights and privileges.

Mr. DAYS. Precisely.

Senator HATCH. We are going to have even worse difficulties in the future as to just what first amendment rights are protected and just how of a punching bag a public figure really has to be when people are deliberately misrepresenting in the media what that public figure stands for.

Mr. DAYS. Yes.

Senator HATCH. Do you believe that the category of fundamental rights the Court has held to be protected by the equal protection clause ought to be expanded? For instance, let me be more fair on that. Should wealth-based classifications with a disparate impact on the poor be subjected to a higher degree of constitutional scrutiny?

Mr. DAYS. Senator, I have addressed that issue. As you know, we talked about *Washington v. Davis* earlier and I raised the concerns that I had about *Washington v. Davis* in the context of a history of discrimination and that where, given the history, we have certain practices that have a disparate impact, we shouldn't forget that history. There should be some concern for how these regulations relate to that history.

But I think, as I said, *Washington v. Davis* established pretty clearly the intent requirement, and therefore I don't see that as an open question. Again, the issue may arise. It may arise in a novel context and I will have to deal with it when it confronts me, but at this point I don't see any reason to regard that particular requirement as open to debate.

Senator HATCH. Well, specifically, just to give an illustration for our conversation here today, do you think that the *San Antonio Independent School District v. Rodriguez* case was correctly decided? As you will recall, in that decision, of course, the Court rejected the contention that disparities in funding for education be-

tween wealthier and poorer school districts triggered any higher standard of review than the rational basis standard. Now, a contrary result in that case would have meant that the Federal courts would be running much of our State and local governments, especially with regard to education.

Mr. DAYS. That decision, of course, also spoke about the fact of education not being a fundamental right and therefore not triggering a higher level of scrutiny. I have been somewhat concerned about the degree to which that ruling has been extended to, in my way of thinking, deny students access to education. It came up in the alien children's case with illegal aliens, but it also came up in the context of free transportation for students living in rural areas to their schools.

And I have to tell you quite frankly that even though *San Antonio v. Rodriguez* has perhaps been dealt with by many States, in fact, Texas has been struggling with that quite recently in getting funding for its educational systems and equalizing it. I think there may be a point, as the Court recognized in the alien children's case, where the absolute denial of access to education may constitute a denial of a fundamental right. I am not prejudging that, but I think that we may be confronted in the future with situations where that doctrine may have to be revisited. But, again, I don't necessarily anticipate it. I think that the Court has spoken about that on several occasions.

Senator HATCH. It would have to be a pretty stark case, is what you are indicating.

Mr. DAYS. Yes, that is correct. That is my assumption. Again, I can't foreshadow what might happen, but I wanted to be candid with you about my continuing concern with that doctrine.

Senator HATCH. In the 1972 case of *Milton v. Wainwright*, to move to another area, under that case a criminal conviction is not overturned on the basis of constitutional trial error if it appears beyond a reasonable doubt that the error itself could not have affected the actual outcome of the trial. The Supreme Court applied this principle in reviewing a claimed violation of the prohibition against certain undercover elicitation of incriminating statements.

In that case, the Court ruled that the mistaken admission by a trial court of a pretrial confession obtained by a police officer in violation of the defendant's sixth amendment right to counsel does not require automatic reversal of the conviction where there is independent overwhelming evidence of guilt and the court concludes the defendant would have been found guilty anyway. Do you agree with that decision?

Mr. DAYS. I agree with the premise. I am not certain I agree with the way the Supreme Court has applied that premise in every factual circumstance. I think there really is, as I have said earlier, concern not only with finality and concern with guilt or innocence, but I think there is also an important concern for the appearance of justice and the appearance of fairness in the process and making certain that the incredible power of the state is not used against individuals in a way that really undermines public confidence in the administration of justice.

So I accept the premise that we shouldn't have, as I said earlier, multiple appeals and multiple reviews when issues of guilt or inno-

cence appear to be pretty clear, but there has to be a concern with not just substance, but process, and I think there are situations where the process is distorted to the extent that there have to be some corrective measures taken by the court.

Senator HATCH. Similarly, in the recent case of *Arizona v. Fulmanente* the Court recently held that the normal harmless error standard applies in reviewing a claim that the trial court admitted involuntary statements by the defendant. Thus, the mistaken admission by a trial court of statements that were involuntary under the fifth amendment does not result in the reversal of the conviction if there is independent overwhelming evidence of guilt and it appears beyond a reasonable doubt that the defendant would have been convicted anyway on the basis of the evidence. Do you have any trouble with that holding in *Fulmanente*?

Mr. DAYS. Well, I am not familiar with all of the facts of that case, but my recollection is that that was a hotly contested decision within the Supreme Court among the Justices, and I had some questions about whether the Court really appropriately reached that issue because, if I remember correctly, the resolution of that legal question was not really critical to the outcome of the case; that whatever the principle was in that case, it was somewhat irrelevant, if I remember the facts of that case.

But I do have some concerns about the treatment of those issues, and apparently there was a similar concern on the Court and it wasn't broken down along philosophical or ideological lines, if I remember correctly.

Senator HATCH. Well, as you know, the Court is looking and has been looking at various issues ranging from punitive damages, excessive litigation. You are going to see more and more cases brought under the Americans with Disabilities Act.

Mr. DAYS. Yes.

Senator HATCH. Certainly, the 1991 civil rights bill is an open invitation for litigation.

Mr. DAYS. Yes.

Senator HATCH. Many people are feeling that our country is becoming so overlitigated that it is very difficult to do business. People are getting out of business; they don't want to be involved anymore. They just can't stand the courtroom battles and the oppression of excessive litigation. A lot of this is going to have to be considered by your office because there has to be some reason in the law that—you and I both probably would agree that litigation plays a very important role in evening up wrongful conduct and in trying to even up the conflicts of society.

But I think you might consider agreeing with me that we have gone way beyond the pale in this country to the point where it is becoming difficult to do business, it is becoming difficult for people to live in some ways. Litigation is used for extortion purposes. There is a rise of litigating attorneys in this country who are filing suits because they know that they can get at least a defensive cost settlement out of the matter because it is cheaper to settle for what the costs of defense are than to go to court and take your chances and win it where you lose more anyway.

Mr. DAYS. Yes; well, there is certainly one way in which the Solicitor General can be very helpful. As you know, the Solicitor Gen-



eral has to approve appeals by Government agencies from the trial courts up through the courts of appeals, and I think it is really incumbent on the Solicitor General to take into consideration, among other criteria, the impact that taking another appeal will have on certainly the Federal judiciary.

Justice Potter Stewart referred to the Solicitor General as a traffic cop, and I think that is true not only at the court of appeals level but, of course, at the Supreme Court level. And I think that, as a general matter, former Solicitors General have done a very good job of performing that function. It is for the benefit not just of the Court, but for the system as a whole.

Senator HATCH. Well, thank you. I mentioned in my office the other day the *Meinhold* case.

Mr. DAYS. Yes.

Senator HATCH. It is a very important case, regardless of which side you would be on in the case, and there has been some indication that the administration may not want to appeal it because they happen to agree with the conclusion in the lower court. Yet, it needs to be appealed to determine just exactly what the law is really going to be in this area.

I encourage you to appeal it, regardless of which side you take in that matter, so that we have some definitiveness within the law rather than have the conflict that will inevitably occur within the circuits where ultimately it is going to have to go up to the Supreme Court anyway.

Mr. DAYS. Yes; well, I can't speak to that particular case. I am obviously familiar with it, but I think that in the past there has been a recognition—when I talked about the orderly development of the law—that where there have been major statutory or constitutional issues, Solicitors General have not resisted the grant of review by the Supreme Court because they felt that it was appropriate to have the matter resolved; that it had percolated enough in the lower courts, the issues were very clear and the time had come for the Supreme Court to provide some definitive guidance. And I certainly will operate with those values in mind.

Senator HATCH. But I am offering a suggestion to go beyond that and file an appeal in that type of a case.

Mr. DAYS. Well, the same principle applies, Senator.

Senator HATCH. Sure, because I think that there are some of these issues that are going to tear society apart until the definitive opinion is rendered, and it is better to find out where we stand than to let it just percolate because we have got a result that some people in the Government might like at the lower level.

Mr. DAYS. Yes.

Senator HATCH. Now, that sometimes cuts both ways. That may be a situation where one time the liberals might not like the appeal taken, the other time the conservatives will not like it. But I think in most cases where it really involves a unique question of law, you might consider taking the appeal just to make sure that it is ultimately and finally resolved for everybody to see, regardless of which way it goes.

Mr. DAYS. Well, I think this is a fundamentally important issue that you have raised and certainly something that will be part of my deliberative process.

Senator HATCH. Well, thank you. On the Americans with Disabilities Act, as you know, I played a significant role and managed the floor on our side and voted for that bill, but I also recognize that if that bill is misapplied—it has a law of reasonability within it and a reasonability standard, but some would think it should be applied without reason, and this is another area where we have got to define the law relatively quickly or it will tie this country into knots, and tremendously expensive knots at that.

So I am hopeful that you will watch that bill with a great deal of consideration because there are those who would ignore the provisions that require reasonability before they impose the burdens of that act on the average business or the average facility, and if those are excessively administered it could just shut down the economy and shut down our country. That is why we wrote it that way so that there is some rule of reason and some reasonable way of resolving problems.

The same way with the Civil Rights Act of 1991. The average employment discrimination case today costs the defendant employer about \$80,000 just to defend it. Consequently, there is a new industry in America where they bring these employment discrimination cases every time somebody is discharged even with good cause because they know that they are going to be able to talk the defense lawyer, which in many cases is an insurance company, or at least in many cases where you have a fairly substantial business, into going into the defendant business person or insurance company and saying, look, it is going to cost you at least \$80,000 to defend this. They will settle it for \$50,000.

Mr. DAYS. Well, I don't know from my own experience whether that is an accurate characterization, Senator.

Senator HATCH. Well, I can tell you I do.

Mr. DAYS. Well, to the extent that the Government can be helpful in clarifying the standards and clarifying the limits of the law, I think that is the type of contribution that ought to be made so that both sides of the controversy understand clearly what the rules of the game are, and where there is that type of clarity there will be less likelihood of the extortion example that you were just mentioning.

Senator HATCH. Well, as you can imagine, that is one thing that I am very concerned about and that is one reason I am bringing these points up because you are going to be faced with these types of nuts and bolts, everyday economic difficulty problems that you can play a pivotal role in helping to resolve rather than let them go on and on and on, to the detriment of society as a whole.

Mr. DAYS. Yes.

Senator HATCH. Well, I want to tell you, Professor Days, how much I personally think of you. I think you are a very fine person. I look forward to working with you. I personally have supported you and will support you, and I don't expect you to agree with me on everything, naturally. It would be a wonderful thing if you did, I am sure, but I will enjoy having our running dialog from time to time on important issues and look forward to you giving me good reasons why I should change my viewpoints from time to time, and hopefully vice versa.



But I wish you well in this job and I am going to do everything I can to see that you are confirmed at the earliest possible convenience so you can get to work over there and be of whatever help I can be to you. I am proud that you have this opportunity. You deserve it and I think you will do a great job.

Mr. DAYS. Thank you, Senator.

Senator HATCH. I hope you have not minded all these questions, but I just kind of wanted to go over them and I think it is important for the public at large to hear some of these questions, too, because they are important. I have only skirted just a few of the issues that naturally you are going to be confronted with, but they are important issues.

Mr. DAYS. You have, obviously, provided me with a homework assignment on some of those criminal law decisions.

Senator HATCH. Well, thank you. Senator Biden has just a few questions that he would like to ask in closing. He had to go to another meeting for a few minutes, but I understand will be back in just a few minutes. So I will recess these hearings for 5 minutes and allow Senator Biden time to get back.

Mr. DAYS. Thank you.

Senator HATCH. Thank you.

[Recess.]

The CHAIRMAN. Thank you very much, professor, for accommodating me. You have been around, as I said earlier this morning, long enough to know that a measure of one's acceptance is the absence of Senators, and so on that score I congratulate you.

Mr. DAYS. Thank you.

The CHAIRMAN. And you have done—it is presumptuous of me to say it—incredibly well in your testimony here today. Let me pursue one area that is going to be on our plate very quickly after you are confirmed—and you will be confirmed, I am confident—and that is habeas corpus. As you know better than I do, the Supreme Court has issued a number of opinions concerning habeas corpus in recent years, and I make no secret about it that I think it has been in the wrong direction, but that is my view as a legislator.

One issue it has addressed is whether a second habeas petition should be limited to cases in which the petitioner claims he or she is innocent of the crime for which they were charged and convicted. Now, my concern in this area is that an innocence limitation excludes cases that we would all agree deserve a new trial; for example, a case where the prosecutor knowingly presented perjured testimony at the sentencing phase of the trial.

I don't know that any right-minded prosecutor or person in this country would suggest that that is not an appropriate circumstance to grant a new, if not trial at that place, at least a new sentencing phase to determine whether the death penalty was appropriate in a case, or the size and nature of the sentence.

Last year in *Sawyer v. Whitley*, the Supreme Court held that some sentencing claims must be permitted. It is likely that this issue will continue to come before the Court as the specifics of what claim can be presented are determined, and I think it is going to be an area that you may very well find yourself—not because you seek it, but because it is right and because there is controversy—you may find yourself dealing with.



In your view, if you are able to speak to it now, or you would rather submit it in writing, or you don't have a view at this moment—in your view, should the Federal courts bar challenges to constitutional error at the sentencing phase of the trial?

Mr. DAYS. I can speak in my personal capacity. I don't think that those should be barred.

The CHAIRMAN. If this issue again comes before the Supreme Court, are you in a position to indicate what you would recommend what position the Government take?

Mr. DAYS. No, I am not, Senator.

The CHAIRMAN. Could you tell us—and I understand if you can't, but could you tell us what standards you would ask to be considered or what measure you would—well, actually, let me withdraw that question. I will withhold the question because it may not be—

Mr. DAYS. I was taking a deep breath as you proceeded, Senator.

The CHAIRMAN. No, no. It will move you in a direction that I acknowledge is not particularly appropriate for you to speak to now. Let me move to another aspect of habeas that is still ripe. Without getting into any specifics about existing Supreme Court cases, let me ask you a general question about the deference a Federal court should give to the legal determination of State court judges.

Some have argued, like my colleague, Senator Hatch, for whom I have a great deal of respect, that Federal courts should defer to State court determinations of constitutional law in all cases. I think that is an accurate reflection. I may be mistaken. It is not?

Let me withdraw Senator Hatch's name. Some have argued on this committee and off this committee that that should be the standard, and over the past few years the Justice Department, too, has argued that the Supreme Court should adopt what is referred to as the full and fair rule of deference in all habeas corpus cases. In other words, the Department has argued that a Federal judge should defer to a State court determination of constitutional law, even if the interpretation was incorrect, as long as the State court has considered the constitutional question.

Do you believe the Federal courts have the obligation to correct the constitutional errors of State court judges, assuming they are errors?

Mr. DAYS. In my personal capacity, I have taken a very clear position on that. I believe that they do.

The CHAIRMAN. Now, last year in *Wright v. West* a majority of the Court refused to adopt the rule of deference sought by the Department of Justice. This year the Court, in *Withrow v. Williams*, again refused to adopt the rule of deference. In deciding the Department's position on this issue in future cases before the Supreme Court, I take it you will consider whether the Court's refusal in *Wright* and *Withrow* to accept a broad deference rule should be adhered to or attempted to be overruled. I assume you would take the present rulings into consideration, is that correct?

Mr. DAYS. Absolutely; I think what the Court has been doing is looking at what it understood to be the intent of Congress in dealing with this against the backdrop of the historic writ and it has come to the conclusions that you indicated. So, that would have to have a significant bearing on my judgment.

The CHAIRMAN. Now, so I don't have to ask you all these questions, let me take a moment to peruse the remaining questions. I would like to be clear about something else. Under the current habeas statute, the Federal habeas courts are directed to accord a presumption of correctness to State court findings of fact, and the controversial issue that we are talking about here is whether there should be a rule of deference with regard to State court rulings on questions of constitutional law and on the application of what that law to the facts of the case would mean.

What do you believe would be the result if the Court or the Congress, for that matter, adopted a general rule of deference?

Mr. DAYS. Senator, I—

The CHAIRMAN. Not that you would intervene or not.

Mr. DAYS. Yes, yes.

The CHAIRMAN. What do you think the result would be?

Mr. DAYS. Senator, my view all along has been that the Federal courts play a unique role in our society in interpreting and applying the Constitution, and so I start with great reservations about anything that would relieve the Federal courts of playing that role or remove the jurisdictional responsibility to carry out that function.

The CHAIRMAN. Well, let me conclude this by suggesting for your consideration—and I think we are in agreement on this, not that that is necessary at this point. It seems to me that were we to adopt a general rule of deference—and it is argued by the proponents of that position that if we were, what we would do is we would reduce tension between our State and Federal courts.

I would just raise for your consideration the prospect that it may increase tension because under a rule of deference Federal habeas courts would be looking at State court judgments not to see whether they got it right, but to see whether the court acted unreasonably or in bad faith. It would seem to me where there were obvious breaches of constitutional law, the Federal courts would feel compelled to find that that had occurred, and instead of concluding that they got the law wrong, they would conclude that they acted in bad faith or that they acted unreasonably. I would argue that that would be the likely outcome. I don't think any individual case would be determined differently.

For example, let us say there is a full and fair rule and it was clear that the prosecutor knowingly admitted perjured evidence at the sentencing phase. It doesn't go to innocence. Let us assume the State court reviewed that and concluded that it was not a violation of any constitutional right of the defendant; therefore, the death penalty should be imposed. The one bite out of the apple is given, assuming we change the law. It was a full and fair rule.

I can't fathom most Federal courts suggesting that, well, under the full and fair standard it is not ours to review. I would respectfully suggest, and I am not asking for a response, that you are as likely to get from a Federal court the conclusion that there was bad faith or unreasonableness. I think that would begin an emerging doubt of respect for some State courts more than others in terms of their application, their abilities, their earnestness, their jurisprudential capabilities, if you will, and I think that would set it back, not enhance it.



Mr. DAYS. Well, I don't really know the answer to the point that you were just raising or your observation. I do know, although I don't know the details of the legislation, that the administration is working very closely with the Congress in trying to address habeas and crime issues. All I can say is that as Solicitor General, if Congress sees fit to enact legislation that bears on some of these issues, it will be my duty to defend that statute before the Supreme Court.

The CHAIRMAN. Well, as my mother would say, with the grace of God and the goodwill of the neighbors, we will not enact a full and fair principle in the habeas legislation that I think we will enact this term which will reduce what most nonlawyers refer to as frivolous habeas applications, and some lawyers.

But I thank you very, very much, professor. I look forward—we will work less with you than we will other members, by the very nature of what we have debated here and discussed, the independence of your office. It has been a long time, as they say, between drinks for you and me. I mean, we both were much younger when we sat in these relative positions. I sat in a chair down there, but from your writings and from what I know of you and from what has obviously been the case with me, we have—how can I phrase it—we have each gone through a maturation process—you needed it much less than I did—that has hopefully been the mark of an educated person, where our positions have not changed, but been refined.

I think that you are uniquely suited for this job in terms of your temperament, in terms of your overall attitude toward the role and responsibility of a Solicitor General. Your academic and intellectual credentials and your integrity have never been in question in anybody's mind, ever. So we look forward to working with you.

As you can tell from my Republican friends, apparently there is a consensus that crosses party lines. I want to pay special tribute to Senator Hatch and Senator Thurmond and others. In light of some of the legitimate positions you took as the head of the Civil Rights Division very much in opposition to positions that are held by my Republican colleagues, it would not have been surprising had they concluded that this is something they should make a big case of, not again in terms of your person or your character, but on issues relating to substance, ideology, and they did not and they have not.

I hope it is something that we Democrats learn if and when—I hope it doesn't occur soon—we are back in the minority or we don't have a Democratic President because they have said they were going to lessen—how can I phrase it—the ideological combat and thus far they have done that, and I compliment them for it. As I said, I hope we all learn something from it.

But, again, thank you very, very much. With a little bit of luck, we will be able to move to a vote on you in the committee soon and to the floor of the U.S. Senate so you can actually get underway. As you said at the outset—I don't blame you and I am amazed that you have been able to contain your pride—what a great honor, what a great, great honor to be the Solicitor General of the United States. I really think, quite frankly, for a lawyer that is a greater honor than being Attorney General. That is a greater honor than



is afforded a lawyer in this country, other than being on the Court, although I don't discount your assertion that you may very well be—what did you say—the 39th clerk. But it is a great honor, and enjoy it. You are entitled to enjoy it, and your family obviously is proud and they should be. Again, thank you very much.

[The prepared statement of Mr. Days follows:]

#### PREPARED STATEMENT OF DREW S. DAYS III

Mr. Chairman: I want to thank you and the other members of the Committee for giving so graciously of your time to meet with me over the past few weeks about my nomination to become the next Solicitor General of the United States. I appreciate the frankness with which each of you expressed your concerns about the proper discharge of the Solicitor General's duties and hope that you found me equally forthcoming in responding to those concerns.

I also want to thank Senators Dodd and Lieberman for introducing me to the Committee this morning. Like many Americans, I have led a rather peripatetic existence: born in Georgia; early youth in Florida; late teens and early adulthood in New York; and then a series of moves during and after law school from Connecticut to Illinois, to Honduras, to New York, to Pennsylvania, to the District of Columbia, and finally back to Connecticut in 1981. It has been an itinerant but fulfilling life. But I want both Senators to know how especially happy my family and I have been as citizens of New Haven and of Connecticut during the past twelve years.

As a student of Greek tragedy, I have been fairly successful, thus far, in controlling what the Greeks referred to as overweening pride (or *hubris*). But all of you on the committee, especially those of you who are lawyers, must understand how honored I feel to have been chosen by President Clinton and Attorney General Reno to become this Administration's chief lawyer before the Supreme Court of the United States. The late Justice Thurgood Marshall said it was "the best job [he] ever had." It is a job that most lawyers would give anything to have and there are undoubtedly a number of lawyers who would serve with distinction as Solicitor General.

All things considered, I am gratified that the President and the Attorney General, after assessing my qualifications for the job, selected *me*. As a lawyer for the NAACP Legal Defense Fund for eight years, I spent much of my time on Supreme Court issues, largely writing briefs opposing review in cases that I had won in the lower courts, or filing friend of the court briefs in cases involving other parties. During my tenure with the Legal Defense Fund, I also litigated scores of cases at both the Federal trial and appellate court level. Indeed, it was in this connection that I came to the attention of then-Judge Griffin Bell who later, as Attorney General, asked me to become his Assistant Attorney General for Civil Rights.

As Assistant Attorney General for Civil Rights, I had the pleasure of working closely with President Carter's distinguished Solicitor General, the late Judge Wade H. McCree. I spent a significant part of each day discussing what the Department's positions should be and then reviewing drafts of government briefs in Supreme Court cases. In addition to working on the preparation or briefs in the Supreme Court, I also was fortunate to have been invited by the Solicitor General to argue for the United States in five cases raising issues that fell within the responsibility of the Civil Rights Division.

As a law professor, first at Temple University in the 1970s, and more recently at Yale, I have suffered from a disease common to legal academics of being an incurable Court-watcher and analyst with respect to the Court's membership, practices, and opinions. The opportunities for me to pursue this activity have been presented daily in my courses over the past twelve years in the areas of civil procedure, federal jurisdiction, the First Amendment, comparative constitutional law, and anti-discrimination law. For the past several years, I have also taught a seminar on Supreme Court practice focusing on the strategic choices of lawyers, including the Solicitor General, involved in constitutional litigation.

A major attraction of the Solicitor General's job for most lawyers, I suspect, is that he or she serves as the federal government's lawyer before the Supreme Court, affording the incumbent an opportunity to appear personally before the Court in interesting and important cases on a regular basis. I am no exception. However, I am also drawn by the prospect of performing the less public functions of the Solicitor General. Of particular interest to me is the duty to ensure that the government speaks to the Court in a coherent voice, shaping the most responsible position on behalf of the United States.

In carrying out this responsibility, the Solicitor General ultimately must take a stand. But I believe that he or she also has a duty, almost judicial in its character, to hear out competing views within the administrator prior to arriving at a final position, and, wherever principle permits, to seek to reconcile differences of affected agencies. A similar process should take place when the government contemplates entering a case in which it is not a party, or has been invited to do so by the Court. The Solicitor General must listen to the views of the parties in such cases and weigh carefully the consequences of the government's participation for the interests of the United States and the orderly development of the law. A critical element in this process is the longstanding tradition that the Solicitor General should exercise his or her independent judgment in making these decisions. I intend to honor that tradition.

I am aware that the Solicitor General's job is not an easy one for it entails, on the one hand, being a forceful and effective advocate for the Government before the Supreme Court. On the other hand, the Solicitor General, for both ethical and pragmatic reasons, has a duty toward the Supreme Court "of absolute candor and fair dealing." As former Solicitor General Simon E. Sobeloff said, "My client's chief business is not to achieve victory but to establish justice." I believe that my training, experience, and personal style will enable me to perform these important functions effectively. Dean Erwin Griswold has remarked that "it is a tightrope, but the Solicitor General should keep his balance." I hope that all who deal with me, if confirmed as Solicitor General, will perceive me as a person of the highest professional integrity and will respect my decisions even when they may disagree with the results.

With your indulgence, Mr. Chairman, and that of the Committee, I would like to make one final point. Over the last twelve years, I have been actively involved in promoting human rights abroad, most notably in my capacity as the director of a research center at Yale Law School. This work has required me to travel to a number of countries in Asia, Africa, and Latin America and to evaluate their judicial systems. Unfortunately, I have found too few instances in these countries where lawyers and judges are free to act with independence and where other government officials feel themselves bound to honor legal limits set by the courts. These experiences have caused me to appreciate even more deeply than before the genius of our judicial system, in general, and, in particular, the impressive degree to which most Americans show respect for the "Rule of Law."

Since the office was established in 1870, remarkable Solicitors General, both Democrats and Republicans, have contributed in no small measure to building and reinforcing this attitude among our citizenry.

It is another tradition that, if confirmed, I intend to uphold with all the strength within me. Thank you, again.

That completes my prepared statement, Mr. Chairman. I would be pleased to answer any questions that you or other members of the Committee may have.

**The CHAIRMAN.** We are adjourned.

[Whereupon, at 3:30 p.m., the committee was adjourned.]

[Submissions for the record follow:]

## SUBMISSIONS FOR THE RECORD



Department of Justice  
Association of Black Attorneys

DOJABA

May 20, 1993

Honorable Joseph P. Biden  
Chairman, Committee on the Judiciary  
United States Senate  
Washington, D.C. 20510

Dear Senator Biden:

The Department of Justice Association of Black Attorneys (DOJABA), an organization of over 100 black attorneys at the United States Department of Justice, writes to endorse the nomination of Drew S. Days III for the position of Solicitor General of the United States.

During his tenure as Assistant Attorney General for Civil Rights in the Department of Justice, between 1977 and 1980, Mr. Days gave new meaning to the concept of civil rights enforcement. Under his leadership, the Civil Rights Division filed an unprecedented number of enforcement actions, including several large and very complicated cases in the areas of education, housing and employment, that broke new ground in civil rights law. At the same time, Mr. Days insisted that the Division conduct its enforcement efforts in a manner consistent with the highest ethical and moral standards.

Many of our members who worked for him during this period know him as a person of immense warmth, integrity, and character. He is a remarkably compassionate man who, despite his high position and intellect, has never lost sight of the needs and concerns of the common person. In personnel matters affecting his employees, he continually displayed an inordinate sensitivity to their problems. All of these characteristics will serve him well as Solicitor General of the United States.

Therefore, it is with great pleasure and immense pride that we support Drew S. Days III for Solicitor General of the United States.

Sincerely,

Michael E. Robinson  
Chair, Department of Justice  
Association of Black Attorneys



JOSEPH R. BIDEN, JR., DELAWARE, CHAIRMAN

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CYNTHIA C. HOGAN, CHIEF COUNSEL  
 CATHERINE M. RUSSELL, STAFF DIRECTOR  
 MARK R. DISLER, MINORITY STAFF DIRECTOR  
 SHARON PROST, MINORITY CHIEF COUNSEL

## United States Senate

COMMITTEE ON THE JUDICIARY  
 WASHINGTON, DC 20510-6275

June 22, 1993

Mr. Drew S. Days, III  
 Solicitor General of the United States  
 Department of Justice  
 10th Street and Constitution Avenue, N.W.  
 Washington, D.C. 20530

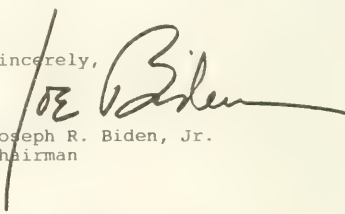
Dear Mr. Days:

Following your testimony before the Judiciary Committee on May 20, 1993, I respectfully request that you respond in writing to the attached additional questions that Senator Thurmond has submitted. Your timely response is appreciated.

Please direct your responses to the attention of Cathy Russell of my staff. Should you have any questions, please contact her at 224-5225.

Thank you for your assistance.

Sincerely,

  
 Joseph R. Biden, Jr.  
 Chairman

Enclosures

\* \* \*

## QUESTIONS FROM SENATOR THURMOND FOR DREW SAUNDERS DAYS, III

1. Professor Days, what is your view of stare decisis and the importance of precedents in our American system of law?
2. It is my firm belief that the role of a judge is to interpret the law and not engage in judicial activism. Please state your views on judicial restraint and whether you see any inherent

dangers in members of the judicial branch engaging in judicial activism.

3. In your speech "Living Without the Constitution", you seem to indicate that the Constitution is not the only source of rights and remedies for the problems that confront our Nation. Please discuss whether you view the Constitution as guaranteeing only certain enumerated rights, or whether you think the Constitution should be interpreted in a more expansive manner to also include unenumerated rights.

4. Professor Days, as you are aware, there have been increasing restrictions on how preemptory strikes can be used by litigants to exclude certain categories of individuals when picking a jury. Do you believe that preemptory strikes continue to serve a useful purpose, or would you favor eliminating preemptory strikes altogether?

5. As you may know, Professor Days, I am the Ranking Member of the Subcommittee on Antitrust, Monopolies & Business Rights. To the extent that you are familiar with the antitrust laws, please give us your views on the antitrust laws and their importance to the competitiveness of U.S. businesses.

6. Please discuss your view of the sentencing guidelines under which, as you may know, the Federal courts have operated for several years now. These guidelines grew out of the Sentencing Reform Act of 1984, which I co-authored with Senators Kennedy, Biden, Hatch and others, and require lengthy prison sentences for violent offenders, major drug dealers, repeat offenders, and serious "white collar" offenses.

7. Professor Days, please discuss your views on the recent Supreme Court decisions in the area of habeas corpus review and whether you see a need to reform the use of habeas petitions.



## U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, DC 20530

August 16, 1993

Honorable Joseph R. Biden  
Chairman  
Committee on the Judiciary  
United States Senate  
Washington, D.C. 20510-6275

Dear Senator Biden:

In your letter of June 22, 1993, you requested that I respond to additional questions submitted by Senator Thurmond following my testimony before the Judiciary Committee on May 20, 1993, concerning my nomination to the position of Solicitor General. As you know, following the May 20 hearing, the Senate gave its consent to my appointment, and I was appointed to office by the President on May 28, 1993.

In light of your request, I have attached responses to Senator Thurmond's questions.

Sincerely,

Drew S. Days, III  
Solicitor General

\* \* \*

RESPONSES TO QUESTIONS FROM SENATOR THURMOND  
FOR DREW SAUNDERS DAYS, III

1. Professor Days, what is your view of stare decisis and the importance of precedents in our American system of law?

As I stated during my confirmation hearings, I believe the doctrine of stare decisis is of central importance to the judicial function and the rule of law. Accordingly, the Solicitor General should, in my view, not request the Court to revisit existing precedent unless there is a sound basis for contending that the circumstances the Court has suggested for an exception to the rule of stare decisis are present.



2. It is my firm belief that the role of a judge is to interpret the law and not to engage in judicial activism. Please state your views on judicial restraint and whether you see any inherent dangers in members of the judicial branch engaging in judicial activism.

I agree that the role of a judge is to interpret the law. Adherence to that role, and corresponding respect for the roles of Congress and the Executive Branch, are fundamental to the legitimacy of the Judicial Branch under our constitutional system of separated powers. At the same time, the courts must be mindful of their constitutionally based obligation to enforce constitutional guarantees in cases properly brought before them.

3. In your speech "Living without the Constitution", you seem to indicate that the Constitution is not the only source of rights and remedies for the problems that confront the Nation. Please discuss whether you view the Constitution as guaranteeing only certain enumerated rights, or whether you think the Constitution should be interpreted in a more expansive manner to also include unenumerated rights.

The theme of my speech "Living without the Constitution," delivered in 1987, was that there is more to democracy than what the Supreme Court has decided on a particular issue. I sought to make the point that where the Court has declined to interpret the Constitution to address a particular problem or to afford protection to individuals in a particular situation, the Constitution contemplates that the legislative and executive branches of the federal and state governments nevertheless retain the authority to address the matter through statutory or other means. And in a democracy, citizens should recognize their important role in petitioning the legislative and executive branches for redress of grievances of that (or any other) sort. Solutions of this sort lessen the occasion for the courts to resolve the same issues through an expansive view of the Constitution.

4. Professor Days, as you are aware, there have been increasing restrictions on how peremptory strikes can be used by litigants to exclude certain categories of individuals when picking a jury. Do you believe that peremptory strikes continue to serve a useful purpose, or would you favor eliminating peremptory strikes altogether?

I believe that peremptory strikes do continue to serve a useful role in certain instances in which a prospective juror might not be subject to disqualification from service for cause, but a party concludes that service by that individual would raise concerns of possible bias. Peremptory strikes furnish a way of assuring those who are most deeply affected by the judicial proceedings -- as well as the public -- an extra measure of assurance that the proceedings are fair.

At the same time, beginning with Batson v. Kentucky, 476 U.S. 79 (1986), the Supreme Court has held in a variety of contexts that litigants must not be permitted to utilize peremptory strikes based on the race of the prospective juror. As Solicitor General, I recently filed a brief on behalf of the United States as amicus curiae in J.E.B. v. T.B., S. Ct. No. 92-

1239, taking the position that the Batson principle applies to gender-based peremptory challenges as well.

5. As you may know, Professor Days, I am the Ranking member of the Subcommittee on Antitrust, Monopolies & Business Rights. To the extent that you are familiar with the antitrust laws, please give us your views on the antitrust laws and their importance to the competitiveness of U.S. businesses.

The antitrust laws have rightly been called our charter of economic liberty. Enforcement of those laws is one of the most important responsibilities entrusted to the Department of Justice, in both the domestic and the international economies. The formulation of the Administration's antitrust policy is primarily the responsibility of the Assistant Attorney General for the Antitrust Division, under the guidance of the Attorney General and in consultation with other interested components of the government, such as the Federal Trade Commission.

Formulation of antitrust policy requires faithful adherence to the purposes of the antitrust laws, an ongoing assessment of the various sectors of our economy, and other federal statutes that regulate economic activity. Assistant Attorney General Bingaman is now engaged in a thorough review of antitrust policy.

An important aspect of the Solicitor General's responsibility is to represent the United States, as a party or amicus curiae, in Supreme Court cases arising under the antitrust laws. I will, of course, consult closely with Assistant Attorney General Bingaman and other interested officials in doing so.

6. Please discuss your view of the sentencing guidelines under which, as you know, the Federal courts have operated for several years now. These guidelines grew out of the Sentencing Reform Act of 1984, which I co-authored with Senators Kennedy, Biden, Hatch and others, and require lengthy prison sentences for violent offenders, major drug dealers, repeat offenders, and serious "white collar" offenses.

The basic purpose of the Sentencing Guidelines of eliminating sentencing disparities among similarly situated defendants and crimes of a similar nature has been in large measure accomplished. There have been some complaints that the Guidelines have not worked in particular cases or categories of cases, but Congress provided an effective mechanism for addressing those problems as they arise, through Guidelines amendment authority of the Sentencing Commission. To date, the Guidelines have resulted in an increased burden for the federal courts of appeals, since the 1984 Sentencing Reform Act permits appeals from sentence in a large number of cases. However, it may be that this burden will be reduced in the future as the courts become increasingly familiar with the Guidelines and issues that surface are addressed by the Commission.

7. Professor Days, please discuss your views on the recent Supreme Court decisions in the area of habeas corpus review and whether you see a need to reform the use of habeas corpus petitions.

As I explained during my confirmation hearing, the Supreme Court decisions in the habeas corpus area must attempt to resolve the competing interests of finality and fundamental fairness in the criminal justice system. Concerns on both scores have been raised about certain aspects of habeas corpus doctrine as it has developed since Congress last amended the governing federal statute in 1966. The Administration has endorsed S. 1441, recently introduced by Chairman Biden, to address those concerns and reform habeas corpus procedures.





# NOMINATION OF ANNE K. BINGAMAN TO BE ASSISTANT ATTORNEY GENERAL

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WEDNESDAY, JUNE 9, 1993

U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The committee met, pursuant to notice, at 9:36 a.m., in room SD-562, Dirksen Senate Office Building, Hon. Howard M. Metzenbaum presiding.

Also present: Senators Biden, Simon, Feinstein, Moseley-Braun, Hatch, Simpson, and Grassley.

## OPENING STATEMENT OF SENATOR METZENBAUM

Senator METZENBAUM. The hearing will come to order. We welcome to the committee today Anne Bingaman, an experienced antitrust litigator who is superbly qualified to serve as the next Assistant Attorney General for Antitrust. Ms. Bingaman has had a distinguished legal career, ably combining the private practice of law with public service and teaching. However, what I find most heartening about Ms. Bingaman's nomination is that it sends a clear signal to the business community that this administration intends to enforce our Nation's fair competition laws.

To put it charitably, antitrust enforcement has languished during the last 12 years of Republican administrations. Antitrust officials, particularly under the Reagan administration, openly challenged the core values of our fair competition laws and in most instances refused to enforce them.

I will never forget one of the early antitrust nominees who then became head of the Antitrust Department who made it unequivocally clear that he just didn't believe in the laws and was totally nonsupportive of them. I remember asking him, well, why would you want to take this position if you don't believe in the laws themselves. My questions were not persuasive as far as he was concerned. He went on to become, I would say, one of the worst antitrust leaders that this country has ever had.

By their inaction and their rhetorical assault on the antitrust laws he, as well as other officials in the administration, undermined antitrust enforcement as a credible deterrent to anticompetitive business practices. However, I believe that under Ms. Bingaman's stewardship the Antitrust Division's policies will change for the better.

Throughout her career, Ms. Bingaman has demonstrated a commitment to vigorous enforcement of our antitrust laws. She began her antitrust career by winning a judgment worth over \$1 billion

against members of a uranium cartel that had stashed their smoking-gun documents abroad to avoid discovery. More recently, Ms. Bingaman represented the State of Florida and 8 million of its consumers in a major antitrust case against a telephone utility.

However, Ms. Bingaman's commitment to antitrust goes well beyond the confines of private practice. She founded the antitrust section of the State Bar of New Mexico, and she is currently the vice chair of the ABA's Antitrust Committee for the litigation section. Likewise, Ms. Bingaman has shown a strong commitment to her community through her pro bono and her philanthropic work.

I would be remiss if I didn't point out that Ms. Bingaman is the first woman to be nominated to head the Antitrust Division, and I commend the Clinton administration for this nomination particularly in that respect. However, such firsts are nothing new for her. She was also the first woman law professor to be hired by the University of New Mexico Law School.

The enormous tasks that Ms. Bingaman will confront at the Antitrust Division will represent another kind of first for her. She must revitalize the Division's enforcement agenda and reestablish the idea that vigorous antitrust enforcement is necessary for the welfare of a free market economy. It should be widely recognized that the ability of American industries to succeed internationally is dependent upon vigorous competition at home and a fair chance to compete abroad.

I also expect the Antitrust Division to focus on those areas of antitrust enforcement that have been ignored for the past 12 years. It is particularly important for the Division to challenge the types of vertical restraints, such as resale price maintenance, which rob American consumers of billions of dollars each year.

As a first step in this effort, I urge the Division to reestablish forcefully its commitment to the per se rule against minimum price-fixing. Rejecting the Pharmaceutical Manufacturers Association request for immunity to fix maximum prices would be one way to do just that.

Ms. Bingaman, to be frank, antitrust enforcement has never been in worse shape. I welcome your nomination because I believe that your experience as a litigator and your obvious determination to challenge the status quo makes you an excellent choice to meet the challenge of revitalizing antitrust.

Now, before we introduce our first witness, we have statements from Senators Thurmond and Pressler to place in the record at this time.

[The prepared statements of Senators Thurmond and Pressler follow:]

#### PREPARED STATEMENT OF SENATOR STROM THURMOND

Mr. Chairman: This morning's hearing is on the nomination of Ms. Anne K. Bingaman for the important position of Assistant Attorney General of the Antitrust Division of the Department of Justice. In addition to the nominee, this morning we also welcome both Senators from Ms. Bingaman's home state of New Mexico, Senator Domenici and Senator Bingaman.

Ms. Bingaman has built a commendable record at a number of positions and firms. Ms. Bingaman has gained a broad and useful perspective as a law professor, founder of her own law firms, and partner in large law firms. In private practice, Ms. Bingaman handled many significant and complex antitrust matters. These experiences provide the substantive foundation for Ms. Bingaman to become the head



of the Antitrust Division, with broad responsibilities for enforcing the antitrust laws fairly in order to protect consumers without unduly restraining desirable business practices. Further, she has received many awards, which attest to the high regard in which she is held both within and outside the legal profession. Finally, I commend her willingness to enter into public service.

I am pleased that the President has chosen Ms. Bingaman for the position of Assistant Attorney General of the Antitrust Division. I intend to support Ms. Bingaman's nomination.

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#### PREPARED STATEMENT OF SENATOR LARRY PRESSLER

Thank you Mr. Chairman. Ms. Bingaman, it is a great pleasure for me to join in welcoming you to this committee. Let me first congratulate you on your nomination. It is well deserved. Having known both you and your husband for many years, I know the President has made a fine selection for this post.

Mr. Chairman, Ms. Bingaman is well prepared for this post. Her background is impressive and bears repeating. As an undergraduate, she attended both Stanford University and the London School of Economics and Political Science, graduating in 1965. She remained at Stanford for law school, earning her law degree three years later.

She began her legal career in the late 1960s as an antitrust litigator with law firms in Arizona and New Mexico. Government service soon followed. She worked for the New Mexico Bureau of Revenue for a year, and later, joined the New Mexico Attorney General's office as a tax litigator. In 1972, she became a law school professor at the University of New Mexico teaching Constitutional Law, Real Property, and Trial Practice, as well as authoring several law review articles. While a professor, she also wrote a book on the ERA under a Ford Foundation Fellowship for the Study of Women in Society. As if all this were not enough, she also served as a consultant to the Federal Reserve Board's Equal Credit Opportunity Task Force.

Returning to private practice in the mid-1970s, she founded her own law firm and served as the National Spokesperson on Women and Equal Credit for the Commercial Credit Corporation. Since moving to Washington in 1975, she has been a partner in three law firms, most recently at Powell, Goldstein, Frazer & Murphy. Her philanthropic activities include service as a Trustee for Stanford University and the Grand Canyon Trust, and as a member of the Board of Visitors for Stanford Law School.

As you can see Mr. Chairman, Ms. Bingaman has developed fully her abilities as an attorney and as an administrator. I am confident she will prove invaluable to the Antitrust Division.

Ms. Bingaman, if confirmed to be the Assistant Attorney General for the Antitrust division, you will be responsible for ensuring the efficient functioning of the marketplace through the prevention of unreasonable business arrangements. Vigorous enforcement of the Federal antitrust laws is crucial in achieving the level playing field necessary for robust competition. Government's power in this area is understandably broad.

By necessity, Federal antitrust laws reach into all sectors of our economy. When dealing with such sweeping power, however, one always must be mindful of how quickly overregulation can chill the natural give and take of a healthy economy. It is a delicate balance which government must strike. I know that you understand this balance and will respect the powers of your office.

During the questioning period, we can explore in some detail several areas of the antitrust laws which impact on my state of South Dakota. Once you are confirmed, I look forward to working with you and Attorney General Reno on antitrust matters. Again, welcome and congratulations.

Senator METZENBAUM. We are very pleased to have her with us this morning and to introduce her to two of our very well-respected members of the U.S. Senate, one who knows her extremely well and one who knows her quite well. [Laughter.]

Senator Domenici, who knows her quite well.

#### STATEMENT OF HON. PETE V. DOMENICI, A U.S. SENATOR FROM THE STATE OF NEW MEXICO

Senator DOMENICI. Well, thank you very much, Mr. Chairman. It is good to be here with Senator Bingaman, with Jeff, and Anne

here sitting on my right. I guess it is kind of common knowledge, Mr. Chairman, that——

Senator METZENBAUM. Excuse me, Senator Domenici.

I apologize, Senator Feinstein. Did you have an opening statement, Senator?

Senator FEINSTEIN. No, Mr. Chairman. Ms. Bingaman and I share an alma mater, and I am very pleased to welcome the better half of a U.S. Senator to this room. [Laughter.]

Senator METZENBAUM. Excuse me, Pete.

Senator DOMENICI. Mr. Chairman and fellow colleagues, let me first say it is pretty obvious that I don't agree with everything that the Clinton administration proposes or does, but I am here today because I wholeheartedly agree that this is a good, solid, if not exceptional, nomination.

I was not privileged to know Anne's legal background and how effective she had been other than from a casual kind of reading and learning about it. I have had an opportunity to study that a bit in preparation for this hearing, and let me say that there is no doubt in my mind that the first criteria that we want in this job is somebody that understands and has a very deep knowledge of the intricacies of antitrust law.

I don't think there is any question that she ranks near the top in America, if not at the top, in terms of her knowledge, her ability, and her experience. So, clearly, I wholeheartedly support her on that count, but I think it takes more than that. Obviously, being from a small State, Jeff and I get to know each other perhaps much better than other Senators from other States. We are friends. We don't agree on everything, but obviously on this particular issue we agree wholeheartedly that this is a lady of real character, of personality that counts, and I am absolutely convinced that her stewardship is going to be exemplary. I look forward to that.

Mr. Chairman, as you might know, I don't agree with you on everything.

Senator METZENBAUM. That is a surprise. I thought you did. [Laughter.]

Senator DOMENICI. Obviously, I don't even agree with you on all of your introductory remarks today. On the other hand, I do agree with everything you said about Anne Bingaman's competency and ability to serve in this job, and I wholeheartedly recommend her as a fellow New Mexican, as a friend of Senator Bingaman's and a friend of Anne's.

I also hope that we will expedite this as quickly as possible through your committee and through the floor. Clearly, every department of this Government and every Secretary and the Attorney General need their top assistant positions filled. Some things are going too slow. I hope this one doesn't.

Thank you very much, and thank you, Anne, for letting me introduce you.

Senator METZENBAUM. Thank you very much for a strong, very persuasive introduction, Senator Domenici.

And now our colleague and our friend, the husband of the nominee, Senator Jeff Bingaman.



**STATEMENT OF HON. JEFF BINGAMAN, A U.S. SENATOR FROM  
THE STATE OF NEW MEXICO**

Senator BINGAMAN. Thank you very much, Mr. Chairman. I appreciate the chance to commend my wife to the committee. She is, first and foremost, a wonderful wife and a wonderful mother to our son, John, who is here in the audience. I know John is a friend of yours.

Senator METZENBAUM. John, why don't you stand up?  
[John Bingaman stood.]

Senator BINGAMAN. It takes John a little longer to stand up now than it did when you knew him better. He has become taller.

I would just repeat what you have said and what Senator Domenici has said: Anne is eminently qualified for this position. Her experience in legal practice has given her the background needed. She is a superb lawyer. She is recognized as a superb lawyer by many who have worked with her and many who have worked against her.

This is a field you have persisted in championing in the Senate, Mr. Chairman, and I have noticed in the time I have been here that antitrust enforcement is one issue you have consistently urged be given adequate attention. I think you finally have a kindred spirit going into position in the Justice Department to enforce the laws.

I do think this is an excellent appointment. The President has chosen well. The Senate will be proud to confirm this nomination, and I think the people of our State, the State of New Mexico, also are very proud to have Anne taking this important job.

Thank you very much, Mr. Chairman.

Senator METZENBAUM. Thank you very much, Senator Bingaman. I learned before the hearing commenced that both you and Senator Domenici have another pressing engagement, and whenever you feel free to leave we certainly will understand that.

Senator Grassley, we are happy to have you join us. Do you have an opening statement?

Senator GRASSLEY. I do not have an opening statement, but I would like to ask some questions later on.

Senator METZENBAUM. Very good.

Senator GRASSLEY. I had a chance to meet with Ms. Bingaman yesterday in my office and I feel very good about her appointment.

Senator METZENBAUM. Thank you very much, Senator Grassley.

Ms. Bingaman, we are delighted to welcome you this morning, and hope that we can accommodate the suggestion of Senator Domenici that we expedite the matter going to the floor. We will indeed try to do just that.

**TESTIMONY OF ANNE BINGAMAN, TO BE ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, U.S. DEPARTMENT OF JUSTICE**

Ms. BINGAMAN. Mr. Chairman, may I thank you—

Senator METZENBAUM. Do you want to bring the mike a little closer?

Ms. BINGAMAN. Certainly; unaccustomed as I am to speaking into a microphone, is that better?

Senator METZENBAUM. Yes, thank you.



Ms. BINGAMAN. I want to thank you from the bottom of my heart, Mr. Chairman, for that incredibly generous introduction, and if I am confirmed by the full Senate, I will do my very best to live up to it.

Thank you, Senator Feinstein, for all your friendship and for your generous statement, and Senator Grassley as well.

May I make just a brief opening statement, Mr. Chairman?

Senator METZENBAUM. Whatever you are comfortable with.

Ms. BINGAMAN. OK; I would like to tell the committee a little about myself and where I come from and how I come to sit in this chair, so far as I can understand that, looking back on my life.

To have been nominated by President Clinton for this job and to have the opportunity to serve with Attorney General Janet Reno is undoubtedly the greatest honor that could befall me or any lawyer, and if I am confirmed I pledge to you and to all Members of the Senate, to the American public, to American business, to do my very utmost to live up to the challenge and to the responsibility that this vitally important job entails.

Let me tell you briefly why I want to serve in government, about my own background, and my interest in the antitrust laws. I grew up in Phoenix, AZ. I was the child of parents who did not attend college, but who were passionately, devotedly, unbelievably interested in politics. Politics was discussed in our house not just at the dinner table, but morning, noon, and night. Issues of government were literally the life blood of our family. Why that was so, I can't really tell you. I can just tell you that it was so.

By the time I was 9 years old, I had formed an ambition to become a lawyer, and it was not because I knew any lawyers because I didn't. Lawyers were at a higher social strata in the society than my family. It was because at 9 years old—when I was 9, it was 1952 and Adlai Stevenson was running for President and Adlai Stevenson was a lawyer, and he was my great, great hero in life. And I determined that if he was a lawyer, I should try to be a lawyer because I wanted so passionately to emulate his life in whatever way I could and to serve in Government.

That sounds like an odd ambition for a 9-year-old girl in Phoenix, AZ, and I would be the first to agree that it was, but—

Senator METZENBAUM. Is that a declaration for the Presidency? [Laughter.]

Ms. BINGAMAN. No; I never had such a thought. Girls in those days, Mr. Chairman, never dreamed such thoughts. That was not within my purview. It would never have occurred to me in my wildest—to me, being a lawyer was like going to the moon. I mean, I didn't know lawyers. It was beyond my imagining. I didn't know what lawyers did, but Adlai Stevenson was a lawyer, so I wanted to try to be a lawyer.

I maintained that passionate interest and commitment to government and politics to such an extent that in 1964 when I was a junior at college—it was at Stanford—Carl Hayden announced that he would take his first summer intern. In those days, the Senate didn't have interns like they do now. Senator Hayden said he would take his first intern from Stanford, and they held an open competition for it. Who would get to be Carl Hayden's intern?

I was determined I would be that person, so I literally bombarded the Senator's office, whom I didn't know. I didn't know him or his aides. There were myself and about 15 men competing for this, and at least half of them were law students, but they didn't want the job as badly as I did. [Laughter.]

So about May 1, I think, just out of sheer frustration at the telegrams and letters I was besieging them with, Senator Hayden's staff and the Senator selected me as the intern, and I will never forget in my life my excitement on about June 10, 1964, reporting for work the first day in this very building.

It was in that summer of 1964 that I was walking outside to catch a cab, I thought. It was in the middle of the afternoon. I had to take a car to the garage. It was right out here at this corner, and I ran for this black—what I thought was a cab, ran down the street on an empty street, and a man backed out of the cab and I was standing right there, and he turned around and it was Adlai Stevenson. [Laughter.]

Honest to God. [Laughter.]

I couldn't believe it, and if I had had 30 seconds to think about, I think I would have been so scared I wouldn't have had the nerve to talk to him. But he was right in front of me and I grabbed his hand and I said, Governor Stevenson, I am your biggest fan, I have admired you all my life. And he said, oh, well, it is so nice to meet you. He was a little taken aback, you know.

And I said, I am going to work for you at the United Nations next summer. He said, you are? I said, oh, yes. I had formulated this ambition. Having achieved this first sort of interim goal, that was my next theory on what I should do with my life.

He said, well, come on up and talk to me; I am on my way up to Bill Fulbright's office; walk me up there. And I said, great, so we walked up to Senator Fulbright's office. I think Senator Bumpers has those offices today, if I am not mistaken, and we talked all the way up here and had the most wonderful visit. He could not have been more—oh, it was overwhelming, really. It was just an incredible—I will go to my grave remembering it.

I went home that night, of course, in high excitement, elated, called my parents and said, you will never guess who I talked to today—Adlai Stevenson. And my parents were so overwhelmed; my mother just broke down and started crying on the spot. It was so—you cannot imagine how people out in the reaches of the country—I mean, that their daughter had spent 7 or 8 or 9 minutes with Adlai Stevenson was just—it sounds funny to you, but it was the most real—that was what I grew up with. It meant so much to me.

So I went to law school because that is the age I was, and at 21, 22, 23, who knows what is going to happen to you in life? You do what is next. I went to law school, met a person in law school who caught my wholehearted attention, much more so than torts and contracts, I have to confess. [Laughter.]

I had my priorities straight. Jeff and I got married in September 1968. I worked in Phoenix a short time while he was in the Army, 6 or 8 months, and then we went to his home State of New Mexico. I had jobs with private firms, worked for State government, became the first woman law professor at the University of New Mexico, consulted with the Federal Reserve Board for 6 months on equal



credit opportunity, wrote a book on the equal rights amendment, had a wonderful, fulfilling career, and then started my own law firm and, by sheer chance, was associated to work on the antitrust part of what was then one of the largest cases in U.S. law going to trial, the uranium case you referred to, and life took me down that path.

So for the last 17 years since 1977, I have been actively and totally engaged in the practice of antitrust law, and it is in the practice of antitrust that I have come to understand the immense importance of the antitrust laws to our American way of life. It is really the antitrust laws which are at the bedrock of our economic system. They give us the robust competition that encourages innovation, that makes us uniquely American, that makes us really what we are.

We don't believe in cartels in this country. If you look at the European Commission, the EC investigations, they are always investigating huge cartels. Other areas of the world tolerate—they don't now, but cartels have been a way of life, I should say, in some parts of the world, not in America, not for 103 years now. We have not tolerated cartels. We don't tolerate big monopolies. We believe in head-to-head, tough competition on the merits, and we believe that is what makes America great, and I believe that with all my heart. And it is the antitrust laws that are at the core of our entire free enterprise system, really, and I have come to understand that from litigating.

It is easy to say those words; it is very different to spend years and years of your life enmeshed in documents and big cases, and that is what I have been doing. And in doing these large and complex litigation matters that I have handled over the years, working with teams of lawyers and teams of paralegals, I have come to understand and appreciate the vital importance of facts in analyzing any antitrust case.

Antitrust is—every case is unique, every market is unique, every set of actors is unique, the set of companies. And facts are the life blood of antitrust, and I understand that because I have been in the vineyards and the trenches developing those facts to see if they can be applied to the legal theory as the Supreme Court and this Congress have made our laws.

If I am confirmed, I pledge to you to enforce the antitrust laws as they were written by this Congress, as they have been interpreted by the Supreme Court, and as the facts before us warrant their application in any particular case. I pledge that to this committee, to the U.S. Senate, if I am confirmed, and to the American people.

If I am confirmed, it will be the honor of my life and it will honestly represent a little piece of the American dream. I will do everything I can in my small part to make our great system of government work.

Mr. Chairman, I would be honored to answer any and all questions you and the committee have.

[The prepared statement of Ms. Bingaman follows:]



## PREPARED STATEMENT OF ANNE K. BINGAMAN

Thank you Mr. Chairman, Members of the Committee. It is a great honor to sit before you today and one I never would have expected. I want to thank Senator Domenici, and of course my husband Jeff, for their kind introductions of me to the Committee this morning. To have been nominated by President Clinton to head the Antitrust Division, to have the opportunity to work, if confirmed by the Senate, with Attorney General Janet Reno at the Department of Justice, is unquestionably the greatest privilege that could befall me or any lawyer. If confirmed, I will do my very utmost to live up to both the challenge and the responsibility that heading the Antitrust Division entails.

Let me tell you briefly why I want to serve, about my background, and about my sincere interest in government and the antitrust laws. I grew up in Phoenix, Arizona, a child of parents who did not attend college, but who were incredibly interested in politics—politics were discussed morning, noon and night. Issues of government virtually were lifeblood. By the time I was nine years old, I had formed an ambition to become a lawyer. Not because I knew a lawyer, because I didn't—I didn't know a single lawyer. Lawyers were much higher in the society than we were. But Adlai Stevenson was a lawyer and he was my hero, and because Adlai Stevenson was a lawyer, I wanted to be a lawyer.

I maintained that commitment and that interest and that passion for government and politics to such an extent that when I was a junior in college and Carl Hayden announced the first internship open to Stanford students in his office and that he would take one, I was determined that I would be that one. I competed against 15 men, many of them law students. Frankly, I hounded Senator Hayden and his staff to such an extent that they finally just said, "Well we'll take this undergraduate woman instead of one of these male law students." With an excitement that I will never forget, I came to Washington in June of 1964 as Carl Hayden's first intern and worked in this very building.

One day that summer, I went out to pick up a car at a garage and bumped into Adlai Stevenson on the sidewalk outside of this building. He was getting out of what I thought was a cab and I ran for the cab and suddenly he turned around and I was face to face with him and I grabbed his hand and said, "Governor Stevenson, I'm so glad to meet you." I spent maybe eight or nine minutes with him and I called my parents that night in extreme excitement and told them that I had met and talked to Adlai Stevenson. They were so overwhelmed that their daughter had actually met Adlai Stevenson and talked to him that my mother started crying on the spot.

That is the background I come from. I went to law school because I so passionately wanted to be involved in government and I really felt that only if you were a lawyer could you do that. Of course at 21, 22, 23, who knows what is going to happen to you. So I went on to law school, married my husband, and we moved to his home state of New Mexico. I practiced law there, worked in state government for a short time and became the first woman law professor at the University of New Mexico. I received tenure, then left academic life to start my own law firm. I became involved, by sheer chance, in antitrust law, and I was fortunate and worked hard, and developed an antitrust law practice which has been the focus of my career for the last 17 years.

In that practice I have come to understand the immense importance of the antitrust laws to our economic system. I know that I share with this Committee the deep and profound belief that the antitrust laws protect our American way of life. They protect competition, they encourage innovation, they foster all the things that make us uniquely American. We do not tolerate cartels in this country. We are not for big monopolies, we are for vigorous, robust, head-to-head competition. If I am confirmed by the United States Senate, I will do everything in my power to preserve the competition that is at the heart of the American way of life in every way possible.

In my law practice I have litigated huge, complex cases. In doing that I have worked with teams of lawyers, teams of paralegals and I have come to understand so profoundly the importance of facts in antitrust litigation. Facts are not quite everything, but they are vitally and crucially important.

If I am confirmed, I pledge to you to enforce the antitrust laws as they are written by the Congress, as they have been interpreted by the Supreme Court, and as the facts of a particular case warrant. That is my pledge to this Committee and to the United States Senate, and if I am confirmed, it will be the honor of my life. I will represent a little piece of the American dream that makes this country great for all of us, and I will do my very best to live up to my part of our great government.

Senator METZENBAUM. Thank you, and I must say to you that I believe you. I think you will do exactly what you indicated you would do. I think those are your intentions and I think you will live up to them.

The policy of the committee is to swear in the nominees. Would you be good enough to stand?

Ms. BINGAMAN. Certainly.

Senator METZENBAUM. Do you solemnly swear to tell the truth, the whole truth, and nothing but the truth, so help you God?

Ms. BINGAMAN. I do.

Senator METZENBAUM. Senator Hatch would like to make a short statement.

#### OPENING STATEMENT OF SENATOR HATCH

Senator HATCH. Thank you, Mr. Chairman, and I want to welcome you, Ms. Bingaman, to the committee.

Ms. BINGAMAN. Thank you.

Senator HATCH. And you will be confirmed. There are no worries about that. I have no worry about that. You are a very talented lawyer and I am confident that you are very well suited to this position and to the difficult challenges that you are going to face in this position of Assistant Attorney General for Antitrust.

You are going to play a very interesting role in the formulation of antitrust policy and the enforcement of our antitrust laws, and I think it will be interesting for you and for all of us as well. I personally found it very refreshing that you as a young person had these types of goals and idols. I think it might do well for a lot of Members of the Senate if we could find some other people who might encourage them as you did Adlai Stevenson. [Laughter.]

One pressing issue that I would just like to raise and that I think you need to address—and I have mentioned it to you—with regard to antitrust reform is with respect to health care. Many are concerned that the threat of antitrust liability has deterred health care providers from cooperating in a manner that would benefit the consumers of this country.

Too often, it seems that hospitals and other health care providers are duplicating rather than sharing costly services and technologies, and they pass these excess costs on to the consumers. When health care providers do cooperate, they may face expensive investigations or even litigation.

In our State of Utah, for example, two hospitals that cooperated to improve the delivery of pediatric services have been forced to spend millions of dollars defending themselves against Federal antitrust investigation. Money that should have been spent on preventing and treating disease has instead gone into the pockets of lawyers.

So I hope you will really look at this very seriously because we have got to have some resolution of these problems in order to bring down the costs of health care, and also make the delivery of health care even more innovative than ever.

I just want to tell you how impressed I was the other day in meeting you in my office, how much I desire that you enjoy this position and that you have every facility and tool at your disposal so you can enjoy and do the job that I know you can do. You come



highly recommended and it is easy for us to feel very good about this nomination. So I just want you to know that that is the way I feel, and we look forward to hearing your testimony here today.

Ms. BINGAMAN. I am very grateful, Senator. Thank you very much.

Senator METZENBAUM. Ms. Bingaman, Senator Hatch has touched upon a subject that you and I talked about when you were in my office. As you know, and the world knows, a number of industries will be asking that the antitrust laws be relaxed with respect to their special concerns. They will claim that weaker antitrust laws will make the United States more competitive internationally and will make it easier for their industry to downsize in response to a shrinking market. Frankly, I don't believe that is the way to compete in the international market, nor in this country.

I am particularly concerned about the area that Senator Hatch referred to, and that is that hospital groups and doctor groups have asked for special consideration under the antitrust laws to be able to proceed forward with mergers, with the joint ownership of an MRI or CAT scanner, as the case may be.

As I indicated to you, and as I firmly believe today, we don't need exemptions, we don't need market allocations, we don't need to make special provisions with respect to these matters. When two hospitals want to buy an MRI or a CAT scanner or whatever the case may be, or are involved in some other joint activity, we ought to have a procedure at the Department that makes it possible for them to get an expedited response as to whether they can go ahead and do it.

Frankly, I don't have any problem with that kind of a situation. I do have concern that has been shared both when Senator Rockefeller conducted a hearing on this issue and Senator Hatch has just mentioned it. I think that the matter can be solved by an expeditious procedure adopted in your Department so that when two hospitals want to do something, they join together in some simple forum, whatever the case may be. They don't have to spend \$250,000 in legal fees, they don't have to be frightened about coming here to Washington in order to deal with the great Antitrust Department, but that rather, in a simple way—if it involves a broad-based plan or total merger and perhaps two private hospitals really trying to eliminate one in order to eliminate some competition in order to raise prices, then, of course, there is a concern. But if two hospitals want to join together and buy an MRI, I have very little difficulty with that; I have no difficulty with it.

Do you think that the Department could expeditiously provide some procedures in order to deal with this problem? And I mean doing this almost from the day you move into the office because we are moving very rapidly toward a national health care program. This will be one of the issues. I would like to get this issue off the table, but I would also like to get it off the table by having the matter resolved so that the hospitals in Senator Hatch's area, the hospitals in Senator Baucus' area—he mentioned it the other day—the hospitals in Senator Daschle's area—he mentioned it the other day—and the hospitals in all of the 50 States who have this kind of a problem can deal with the Antitrust Department without being forced to spend a lot of money on legal fees and, in most instances,



turning their back on the idea because it is just too complicated and too expensive.

Ms. BINGAMAN. Well, Senator, let me state first that I share very much the concern you are expressing, that Senator Hatch has expressed, and that I have heard repeatedly as I have, in the last 10 days or so, 2 weeks, met various Senators about the application of the antitrust laws and the misperception—and I think it is largely a misperception—that is out there that the antitrust laws chill or prohibit the kind of cooperation between health care providers that really helps to keep down costs.

It is my firm belief that the antitrust laws do not and should not prohibit that kind of procompetitive activity, but there is a perception and there is confusion, and perhaps it is because of the complexity, perhaps it is because health care is in so many small, local markets and so many small-town lawyers—and I was one myself for many, many years, so I think I understand it from that perspective—find it difficult to get through the plethora of regulations, speeches, and so forth. It is hard to analyze in a situation and people are scared.

And so, Senator, what I am trying to say is I share the concern that I have heard expressed that we need to work very hard to clear up the misunderstanding and the confusion about how the antitrust laws really apply to typical, common situations such as the standard hypothetical you hear of two hospitals wanting to buy a new piece of expensive equipment and not buy two. Certainly, that should be permissible in virtually any situation, as the Senator points out.

As to exactly what the Division might do if I were confirmed by the Senate, it is hard to sit here and state exactly. What I can state is that I understand the problem completely, I think, or I think I have a pretty good feel for it, and I also understand the confusion and the need for clarification. And I pledge to you that if I am confirmed, we will work immediately and very hard to set up some kind of mechanisms to get the word out to the public in an understandable, comprehensible form as to what the antitrust laws permit because I think they permit most of what needs to be done.

Senator METZENBAUM. Excellent; the drug industry's trade association, PMA, has already asked the Justice Department—

Senator SIMON. Mr. Chairman, if I may just get 60 seconds, I am involved in a markup in another committee.

Senator METZENBAUM. We are happy to have you with us, Senator Simon.

#### OPENING STATEMENT OF SENATOR SIMON

Senator SIMON. I just wanted to come in and say I think that the nominee is someone who will handle this job with distinction and she will move aggressively in an area where sometimes we have not had aggressive action. I am very pleased that she is before us. I regret I can't stay.

Thank you, Mr. Chairman.

Senator METZENBAUM. Coming from you, Senator Simon—you have been a strong defender of the antitrust laws and your support, I am sure, is very meaningful.

Senator SIMON. Thank you.

Ms. BINGAMAN. Thank you, Senator.

Senator METZENBAUM. I started to say the drug industry's trade association, PMA, has already asked the Justice Department for special antitrust immunity for an agreement among its members to limit price increases. That proposal sounds good on its face, but I believe that it is a sham that will not reduce drug prices for most Americans. That is why Senator Pryor and I asked the Attorney General to reject it.

Specifically, the PMA proposes to reduce prices under a formula that would allow drugmakers to offset deep discounts to large buyers with price increases to individual consumers. There is no secret about it; the individual consumer is having an unbelievable challenge in order to pay for the medicines that are needed in the event of a health care problem.

Their proposal would also allow drugmakers to cut the price of drugs for which they have competition while they raise the price of the drugs with respect to which they have a monopoly.

I understand that since the PMA made its request, several drug companies have come forward with better proposals for holding down price increases. However, to my knowledge, none of those companies have asked for special antitrust protection.

What does the Department intend to do about the PMA's request for special antitrust protection for the PMA's pricing proposal?

Ms. BINGAMAN. Senator, as you know, that is a pending matter. I have not been involved in any decision on it because I have not been confirmed by the Senate. I have looked briefly at the papers submitted simply so that I would be aware of the nature of the request. I cannot comment today.

First, it would, of course, be inappropriate because it is a pending matter. And, second, I don't have the knowledge, because I have not been confirmed, to deal with it. I can state this, that generally exemptions from the antitrust laws or requests that antitrust laws be either suspended or declared that they do not apply to a given situation, as the PMA has requested here, are strictly scrutinized, and the department will, if I am confirmed, strictly scrutinize this request.

Senator METZENBAUM. I can understand your being unable to comment on a pending matter, and I think your response is appropriate. I do hope you will give it appropriate attention.

Concerns have been raised that health care reforms could spawn a powerful cartel of health insurance that might dominate the new system. To assure that does not happen, I have recommended, among other things, that the administration's health care plan call for the repeal of the McCarran-Ferguson exemption for health insurers.

Currently, this exemption shields insurers from the antitrust laws and thereby allows them to fix the prices and the terms of coverage and to engage in elaborate tying schemes. I believe we should start the new health care system with a clean slate and eliminate special antitrust treatment for health insurers. I also believe that consumers would pay lower prices if health insurers were subject to our fair competition laws that apply to all other segments of American industry.

In the past, the Department has supported McCarran-Ferguson repeal. What do you expect the Department's position to be on repealing the McCarran-Ferguson exemption for health insurers under health care reform, or do you have a predisposition with respect to that question?

Ms. BINGAMAN. Senator, I would state generally that any exemption to the antitrust laws is unusual. The antitrust laws are very general, as the Senator is fully aware. Exemptions are not common, and generally the proponents of exemptions bear a heavy burden in justifying their special status. I think that that burden is properly upon those who propose exemptions or who propose maintaining them.

As the chairman points out, insurance is something that affects every American. Health insurance will affect tens of millions of people. It is a vitally important issue. I think it is appropriate at this time to take a hard look at the McCarran-Ferguson exemption. I don't have a position, as such, because I am new to this job and I need to get into the details of this, but I can pledge to the Senator we will scrutinize the exemption and I understand the importance of the industry in American life.

Senator METZENBAUM. I have additional questions, but we will follow a 10-minute rule.

Senator Hatch.

Senator HATCH. Thank you, Mr. Chairman. I might mention that the Pharmaceutical Manufacturers Association is not seeking an immunity. They just want a statement from the Department that their actions are lawful. So it is a lot less than I think the Senator from Ohio has indicated to you, but maybe he meant that as well.

Legislation regarding so-called resale price maintenance has previously been introduced in Congress, and this legislation would overturn the Supreme Court's unanimous 1984 ruling in *Monsanto v. Spray Rite Service Corporation* and its 1988 ruling in *Business Electronics Corporation v. Sharpe Electronics Corporation*.

Many antitrust experts believe that the legislation threatens to transform every distributor termination into a jury trial for treble damages for price-fixing and would harm consumers and harm competitiveness. Do you have any view on such legislation and where you might be coming down there?

Ms. BINGAMAN. Senator, I understand there have been several bills introduced over various Congresses on this subject and I have not had a chance to study them in detail and, if I am confirmed, obviously look forward to doing that. I can tell you generally there are two concerns. One is that the *Sharpe* decision of the Supreme Court makes the evidentiary base on which a plaintiff can get to a jury so narrow that it makes it very difficult as a practical matter, I think, to bring resale price maintenance cases, and it is my own view that that needs to be looked at seriously.

On the other hand, I understand the Senator's point that we don't want to draft legislation that drags in unilateral conduct of a manufacturer and makes that subject to a per se rule. So there is a delicate drafting issue here, a delicate line-drawing problem. I look forward to working with the Congress on this, but I think the legislation is important that has been introduced and deserves to be looked at.



Senator HATCH. All right, thank you. Last year in a much criticized opinion in *Eastman Kodak Company v. Image Technical Services, Inc.*, a Supreme Court majority held that a defendant's lack of power in a primary market does not preclude the possibility of market power in "derivative after-markets," such as the parts service markets for their own products.

Now, do you read *Kodak* as a reversal of the trend in which the Court had made use of economic theory to uphold the grant of summary judgment to defendants on antitrust claims, and if so, do you welcome or oppose this reversal?

Ms. BINGAMAN. Senator, I think reversal perhaps may be too strong a word, but I think the Senator's observation of the importance of the *Kodak* is not erroneous. I share your reading that it is an important indication from the Supreme Court to lower courts that facts should be more fully developed by lower courts before summary judgment is granted. To my mind, that is the principal thrust of the *Kodak* decision.

As to whether I welcome or oppose that, as a litigator facts are important. They are critical, and to my mind the balance that has to be drawn here—and I think what courts have been struggling to do, the lower courts, overwhelmed as they are with cases often—drug cases, other major cases—they have very serious docketing problems. We are all aware of that, and this committee is more aware than I am, but I have seen it from a litigant's perspective.

So I think the lower courts have been groping to find ways to clear their dockets, and I think the Supreme Court's decision in *Kodak* is a signal to them that perhaps doing it too early in the litigation can cut off a case that may be meritorious and that more discovery should be granted.

I think there is a need—and I don't know if this would be in my province, but I say this as a litigator—for innovative thinking to help trial courts which are terribly burdened—and cases are complex—come up with ways to streamline cases, either having mini-trials, bifurcating trials, appointing special masters to get discovery over quickly, arbitrating, mediating. There are a number of devices that courts might use, but I personally think early summary judgment before very much factual development may not be the best way to help the lower court docket problem which is very serious.

Senator HATCH. Thank you. Some have suggested that our Government should do more to facilitate the development of key industries. In general, do you believe that antitrust standards should be relaxed to assist such industries? For example, do you favor the adoption of antitrust standards that would permit mergers, acquisitions, or joint ventures in key industries in order to strengthen U.S. firms against their foreign competitors?

Ms. BINGAMAN. Senator, I could not agree with you more that a central issue of our decade and the next two decades is how to strengthen American firms to compete in the world markets. That is where we are today; there is no question about that. It is a major issue and it will affect all of our livelihoods and the strength of this country over the next 30, 40 years, so it is critically important.

As to whether relaxing antitrust rules across the board is an appropriate way to achieve that, I would need to look very hard at the particular industries that would be affected, at the facts, at the

markets in which they compete, at the entire situation that you are dealing with in a particular industry before coming to a judgment on that because these things are really so fact-specific.

I would have a concern, I might state, that we keep competition strong to make American companies strong and able to compete abroad. I believe in that principle, but there may be cases in particular industries. I am not aware, honestly, but I would be, if I am confirmed, very willing to look at that and think about it.

Senator HATCH. Well, thank you. Do you believe that a merger, acquisition, or joint venture should be permitted if it would result in cost savings or other efficiencies that are larger in magnitude than any projected anticompetitive effect? And maybe just one last question: Do you favor antitrust exemptions to permit firms in industries with excess capacity to enter agreements to rationalize or consolidate productive resources?

Ms. BINGAMAN. Senator, as I stated, I think antitrust exemptions are not common. Over the years, this committee has historically not adopted many of them, and antitrust exemptions generally should be scrutinized carefully before being adopted because they are contrary to the basic structure we have adopted for our economy, which is to have the antitrust laws apply broadly. So, in general, I would scrutinize any exemption.

There may be a particular industry in a particular market that presents a situation appropriate. I don't know. Again, this is so fact-specific, market-specific, and you have to analyze the markets these companies are competing in and what the competition is. I would, if confirmed, be very happy to look at that and think hard about it and work through the facts on it, but it is difficult for me to analyze in the abstract because of that.

Senator HATCH. Well, thank you. I want you to know I am proud to support your nomination. We don't have to agree on everything to have my support.

Ms. BINGAMAN. Thank you very much, Senator.

Senator HATCH. And I am very pleased that you are willing to give up your practice for a time and come back and serve the Government. This is a very, very important position and I hope you will really work closely with us up here. We have a wide variety of beliefs on this committee, as anybody can plainly see, and it is very, very important that we try to bring the country together on these issues as much as we can.

Thank you very much, and I am sorry I was late today, but I was in another markup, and I have to go to another thing from here, so I will have to leave a little early. But I just want to compliment you and wish you the best.

Ms. BINGAMAN. Thank you so much, Senator. I appreciate it very, very much.

Senator HATCH. Thank you.

Senator METZENBAUM. Thank you, Senator Hatch.

Senator Feinstein.

Senator FEINSTEIN. Thank you very much, Mr. Chairman. Mr. Chairman, if I may, I would like to enter an opening statement into the record.

Senator METZENBAUM. Without objection.



## OPENING STATEMENT OF SENATOR FEINSTEIN

Senator FEINSTEIN. Thank you, Mr. Chairman.

Ms. Bingaman, I would like to concentrate my question in one area which I think is going to be one that you are going to have to contend with, and that is the area of defense consolidation. With the advent of a very substantial build-down of U.S. forces and weapons systems over the next decade, the defense industry is reportedly due for an equally substantial consolidation of manufacturers and other systems suppliers.

You have stated, and I agree with you, we don't believe in cartels in this country, and you have pledged to enforce the antitrust laws of this country. More than enforce them, however, in this area, under current antitrust law, the Justice Department shares with the Federal Trade Commission the responsibility to review and either approve or deny all large proposed business mergers.

For example, the last administration had a policy more or less of handsoff and let the problems work themselves out. The private sector essentially would mandate the changes. Last year, the FTC blocked the merger of the Alliance Tech Systems, the subsidiary of Olin Corp. Had the deal gone through, it would have merged the Pentagon's only suppliers of ammunition for the M-1 tank and the Apache helicopter.

The Federal judge who upheld the FTC's action, according to Gannett News Service, said, "He openly lamented the lack of comment from the Defense and Justice Departments."

With this consolidation, this year, then, there was a slightly different change earlier on in the year when the Justice Department decided not to invoke antitrust laws to block the latest consolidation of Martin-Marietta Corp.'s \$3.05 billion acquisition of G.E. Aerospace. So you have two different and contending decisions in the last year.

It would seem to me that it is going to be extremely necessary for your Department to develop a consolidated Federal policy on mergers and acquisitions in this industry. I come from a very large defense State, with 1.3 million people out of work, and with literally, as this industry winds down, hundreds of thousands of people being impacted in terms of their jobs.

So I tend to come down on the side of a proactive policy which can send signals to the industry as to what is acceptable and not, save hundreds of thousands of dollars of legal costs, and also enunciate a clear policy. I am very interested to know, because I think the policy that your Department comes up with will either take jobs or save jobs in the long run, what are your thoughts on the kind of policy that might be evolved, whether you are going to take a more handsoff approach or a more proactive one.

Ms. BINGAMAN. Senator, I share your commitment to the Clayton Act, to the merger laws of this country, and if I am confirmed we will look at the facts of every merger and apply the laws to them. We will analyze them under the current merger guidelines, but I pledge to you, if confirmed, we will scrutinize every merger that comes before us.

On exactly what the outcome might be, it is impossible to say. As I have indicated, and as is obvious, every one of these merger situations—in fact, any antitrust case is totally fact-specific. It de-



depends on who the competitors are, what barriers to entry are, what the markets are. They are unique and have to be analyzed on a stand-alone basis.

So it is impossible to project what any outcome might be. It would be foolish to sit here and say that, but I can pledge to you I understand the importance of application of the Clayton Act, the protection of the economy that that act is meant to provide, and we will enforce the merger laws vigorously if I am confirmed.

Senator FEINSTEIN. Then if I understand you, Ms. Bingaman, what you are saying is that your Department would take a more handsoff position and wait and analyze them after the fact rather than, before the fact, create some rules by which these consolidations, mergers, acquisitions might take place in this industry?

Ms. BINGAMAN. Well, we have, Senator, the merger guidelines that were revised just a year ago in May 1992, and put out, and they apply to all mergers, including defense industry mergers. They are really very flexible. They have a five-factor analysis that the Department goes through. These are joint guidelines with the Federal Trade Commission that the Department and the Federal Trade Commission put into effect just a year ago right now, and we need to gain experience, I think, under those guidelines.

If I am confirmed, my proposal would be to work closely with those guidelines, apply them to each specific fact situation, and make a reassessment down the road when we have more experience with them. In other words, it would be difficult at this point for me to say we need a special set of guidelines for defense because my understanding and belief is that the current merger guidelines are flexible and broad enough to apply to the defense industry.

They have an efficiency factor to consider, a failing firms factor, and they are broad and flexible. So my thought would be, if I am confirmed, to gain experience with those guidelines as applied to defense mergers before coming to a judgment on that.

Senator FEINSTEIN. Thank you very much. I think you do see that there are going to be some special problems presented in this area as companies decrease their prowess in the area, and one of the things that I think this Congress hopefully is most interested in is seeing that these companies are able to transfer their technology, to develop peace time uses as substitutes, and to convert work forces. I think that, for my State, this is going to be extraordinarily important in keeping people employed.

I might just also say, Mr. Chairman, I want to commend Ms. Bingaman on many of her writings, particularly, frankly, as they affect women. I think you have made some very important contributions.

Ms. BINGAMAN. Thank you.

Senator FEINSTEIN. I think you will be a very striking figure in that Department, and I want to say it is my pleasure to support your nomination.

[The prepared statement of Senator Feinstein follows:]

#### PREPARED STATEMENT OF SENATOR DIANNE FEINSTEIN

Good morning, Mr. Chairman. I'm delighted to see the Committee's acknowledged expert on antitrust matters at the helm of this morning's hearings, and I'm equally delighted to welcome you, Ms. Bingaman. I look forward to tapping your impressive

expertise in this area a little later on, but want now simply to commend you on an extraordinary record of professional and personal achievement.

You and the President can be extremely proud of this nomination. I, for one, hope that we can get quick concurrence on your appointment from our colleagues across the aisle so that you and the Attorney General can begin work as soon as possible.

Let me just add briefly for the record, Mr. Chairman, that in reviewing Ms. Bingaman's background I was struck and impressed by her obvious and longstanding commitment to removing obstacles from women's paths to financial, political and personal equality. She has written thoughtfully of the need to assure that women must have an equal—and legally meaningful—role in managing marital property, of the fact that assuring equal rights needn't require the denial of privacy to men or women, and of the importance of assuring all women reproductive choice.

I am confident, Mr. Chairman, that this nominee will bring to the Department of Justice the same legal brilliance, commitment to equity, and sense of personal balance that she has so well demonstrated in her life and career to date. Although I do not sit on the Chairman's distinguished Antitrust Subcommittee, Ms. Bingaman, I hope that we have the opportunity to work closely together at some point during your tenure.

Congratulations once again, and thank you, Mr. Chairman.

Ms. BINGAMAN. Thank you very much, Senator. I appreciate it.  
 Senator METZENBAUM. Thank you very much, Senator Feinstein.  
 Senator GRASSLEY.

#### OPENING STATEMENT OF SENATOR GRASSLEY

Senator GRASSLEY. Congratulations once again. I happen to be a member of the Finance Committee as well as this committee, and it brings me into the intersection of American trade policy and our antitrust policy by serving on these two committees. By the way, I work with Senator Metzenbaum on the point that I am going to be bringing up with you.

Many of our major trading partners do not have vigorous antitrust enforcement. In Japan, for instance, the maximum antitrust penalty is approximately only \$40,000, is versus \$10 million in the United States. The consequence is toleration—I think you can call it toleration—of cartel behavior. Companies allowed to form cartels overseas can exclude American firms from their markets and can use the monopoly profits that they earn to subsidize their acquisition of market share in the United States.

After long deliberation, your predecessor, James Rill, convinced Attorney General Barr to modify the Department's policy on extraterritorial enforcement of the antitrust laws. Mr. Rill modified the Antitrust Division's international guidelines so that, consistent with the Foreign Trade Antitrust Improvement Act, it will prosecute overseas Sherman Act violations which cause direct and substantial harm to U.S. exporters.

Now, I am not satisfied that that goes far enough, but in regard to that—and I think you probably answered this question when you used the words that you were going to pledge, in conformance with Supreme Court decisions, to enforce the antitrust laws. So I will just simply ask you the extent to which we can count on you to continue this policy, that has got no political connotation, but I refer to it as the Bush administration policy, of challenging anticompetitive conduct overseas which injures U.S. exports in violation of the Sherman Act?

Ms. BINGAMAN. Senator, I am familiar with what you are speaking of, and I state to you that where the facts before us make out



a violation of U.S. antitrust laws in the situation you are describing, we will bring such cases.

Senator GRASSLEY. I think that is a very good answer, and I think you are the sort of a person that will go an extra mile to make sure that those facts are ferreted out and actually look for facts and not necessarily sit back and just wait for those facts to come to you.

Continuing, while I said the previous administration was very vocal about this policy change, there were no cases that were actually brought, and that is to the best of my knowledge. I don't know of any. You may. So, to what extent can you commit to prosecuting foreign cartels that hinder U.S. competition? To some extent you have answered that by saying that where the facts indicate that, you would, but do you have anything beyond that to say?

Ms. BINGAMAN. Senator, you know, it just is a fact these things are so totally fact-specific, you cannot say in advance I am going to bring a case in an industry until you know the facts and you know what you can prove and you know what the evidence is. It would be irresponsible and you would be kidding yourself and the committee, but I can pledge to you I think I know how to build a case. I think I understand what is involved.

The Department has some of the finest lawyers in the Government and in the world. We are incredibly fortunate in that respect, and we understand the importance of these international issues in the American economy today.

Senator GRASSLEY. In your visit with me in my office, you brought up the *Zenith v. Matsushita* case. In that decision, the Supreme Court was faced with anticompetitive behavior in U.S. markets by a foreign cartel and whether that activity violated the Sherman Act. Specifically, the plaintiffs in that case alleged that the defendant, Japanese consumer electronic producers, were engaged in a cartel in the Japanese market. The cartel allowed them to earn monopoly profits in Japan, exclude foreign firms from the Japanese markets, and then subsidize below-cost pricing of goods sold in the U.S. market, to the detriment of efficient U.S. firms. Of course, the Supreme Court rejected the plaintiffs' predatory pricing Sherman Act claim as economically untenable.

My question is whether or not you think the *Zenith* case was correctly decided. Do you feel our antitrust laws should reach the use of monopoly profits earned overseas to subsidize below-cost selling in the United States?

Ms. BINGAMAN. Senator, I read the *Matsushita* decision when it came out, and have read it several times since, and it causes me concern that the Supreme Court in that case did not allow it to proceed to trial after, as I recall, 9 years of discovery, very arduous discovery, and a third circuit opinion which had upheld the plaintiffs' right to simply present the facts to a jury. So I would say that I have concerns with that opinion and I can understand the issue about it.

Senator GRASSLEY. As I indicated, under Senator Metzenbaum's leadership, he and I have introduced legislation and developed a bill which addresses precisely this situation. It creates a new cause of action in antitrust law against firms which exclude foreign com-



petitors and/or avoid price competition and use their domestic cartel power to facilitate below-cost selling in the United States.

Now, of course, I know that you have not studied the bill and may not be familiar with the details, but do you think that you could support legislation which takes this general approach, even though not specifically the language of the bill, because you haven't studied it, unless you have looked at it?

Ms. BINGAMAN. No, only in the most overview, 5-minute sense. I know there were bills.

Senator GRASSLEY. Then maybe you could give just some comment on the general approach of the bill.

Ms. BINGAMAN. I, Senator, truthfully don't feel competent to do that. I can tell you that I understand the concerns that the bill is addressed to, and I will make it, if I am confirmed, a priority to study those bills and to work closely with the committee.

Senator GRASSLEY. I hope Senator Metzenbaum would feel that I was appropriate in pursuing that.

Senator METZENBAUM. You were not only appropriate, you were commendable, superb. [Laughter.]

Senator GRASSLEY. Thank you. Now, you already discussed with Senator Metzenbaum and Senator Hatch some issues with health care. You have indicated that you think that many of the fears that have been raised are unfounded. Could you help me to get some feeling for what you might do, what kind of joint activity by hospitals is likely to be challenged by your Antitrust Division, and what might not be challenged as some sort of benchmark? Because we can't have every possible business activity between various groups of people challenged by your Division, especially activity being considered in order to save money and efforts directed toward saving health care costs. How will you communicate to health care firms?

Ms. BINGAMAN. Senator, I am 100 percent in accord with the goal that you are stating, also, that we need to work as hard as possible—and I pledge to you, if I am confirmed, I will put immediate effort into this to clarify and explain clearly and simply for a nationwide understanding and use in small communities all over the country the application of the laws.

I think, honestly, it would not be wise for me to sit here today and try to horseback that in a few sentences. I could well make mistakes. I would want to consult with the people in the Division, if I am confirmed, who are expert at it, but I can pledge to you that I understand the importance of clarifying this, of clearing up the confusion, and if I am confirmed, we will move toward that.

Senator GRASSLEY. I think that an important statement here would be if you said you were going to use news conferences, newsletters, regional meetings, however Justice Department people get the word out. Would you be doing that sort of an approach, trying real grassroots education?

Ms. BINGAMAN. Senator, we will—I think I can pledge to you, if I am confirmed, we will be doing that and everything else that we can think of that is cost effective and within the budget to explain this in the most effective communicating way possible, and exactly what that is, I can't tell you today, but I really understand the need to make this clearer because people don't understand it. I

know that they don't, and I know that that is a major part of the problem today and a major part of the concern about the application of antitrust to health care, and it is a huge issue in the country and it needs to be addressed head-on.

Senator GRASSLEY. I think you make a very good point based on sincerity and dedication, and I appreciate that.

Thank you, Mr. Chairman.

Senator METZENBAUM. Thank you very much, Senator Grassley.

Senator Simpson, we are very happy to welcome you this morning.

### OPENING STATEMENT OF SENATOR SIMPSON

Senator SIMPSON. Mr. Chairman, it is always good to work with you—I mean, usually. [Laughter.]

Senator METZENBAUM. I liked it the way you put it the first time—always.

Senator SIMPSON. I will just let the record disclose that what I said first was exactly what I meant. You are a special person and I enjoy you, and my friend, Chuck Grassley. When the two of you get together on a bill, we know that it is usually a very thoughtful product, and I mean that. I have watched you.

Senator METZENBAUM. Even you and I are together on a bill in this area.

Senator SIMPSON. We certainly are. What do you think of that? [Laughter.]

Well, Anne Bingaman, you are a known person to me and I have the highest regard for you, and you will be a very superb Assistant Attorney General for Antitrust. You and I have visited before, both professionally and socially, on some of the things that you are interested in. I know you are going to do a tremendous job. It is something you have always wanted to do. I think that is a remarkable dream come true, as you say, and I am very confident that you will do well.

I know that others have asked about the issue of health care. Senator Metzenbaum has some strong feelings about some of the requests coming in that area from doctors and providers, but mine comes from a bit different area. I think what we are going to see with regard to the terrible blows of any health care plan with regard to rural health care, which in Wyoming truly is frontier health care—we won't be able to do managed competition because we don't have competition to be managed.

Then the rural communities all over America who fell for the bait of the Hill-Burton money 20 years ago, and said go build a hospital, they have got a new thing called Hill-Burton—every community in America got into that and now they can't sustain those.

I would ask you if you could look at the issue of consolidation of hospitals within communities because surely two of them will go broke, where if one can be merged—and I can cite a Catholic hospital in our capital city and a tax-supported hospital within the community. They need to merge so that one of them can be successful financially, and yet there is where the antitrust provisions come in. Would you direct some energy to those things, that issue?

Ms. BINGAMAN. Senator, if I am confirmed, we absolutely will. Let me just state briefly, my understanding is that the Division



has approved over 250 hospital mergers in the last 5 years and, between it and the FTC, have challenged less than 10. So the fact is, on the record, the antitrust laws have not had the terrible effect on hospital mergers that is believed.

But, again, we have a very serious perception problem out there because the laws are complicated. They are being applied by people in small towns like you come from and I come from, and people don't understand it, and I really appreciate that fact. So we need, without any question, as a government—and if I am confirmed, I will make it a priority, as I have told Senator Grassley and Senator Metzenbaum, to explain the laws as they currently exist because I think those laws are flexible enough and broad enough to permit the situations that need to happen, and, in fact, have permitted it. But because people don't understand it, they are afraid to do things, and that is a problem.

Senator SIMPSON. Indeed, it is, and I think that the case I cite is or will be resolved, so it is not that, but indeed it is a problem. Within the community, the easy comment is, well, we tried that, but they said we couldn't do it, we were in violation of antitrust law, and then the frustration starts.

Ms. BINGAMAN. That is exactly what people are afraid of and that is the challenge for the Government and for the Antitrust Division and the Federal Trade Commission. I don't think there is any question that is what is on the plate to be done, is to explain it clearly and simply so that people know what it is.

Senator SIMPSON. Well, I think you have a sensitivity toward the background of a smaller State and the issues that happen in a smaller community.

Then one other provincial, and yet not completely so, issue. There were several of us from the Western States, Democrat and Republican alike, who had requested the Attorney General to carefully go into the issue of antitrust violation with regard to the lamb and sheep industry. There were several of us—Senator Daschle, Senator Baucus, myself, Senator Wallop, many of us, and that was ongoing under the previous administration.

Would you assure that that issue is continued to be pursued because we have a situation where, at the farm gate, the product is \$4 and suddenly when it ends up on the counter of Giant Super it is a huge figure? Nobody can figure where it came about—the middleman, the breaker, the feeder. I know that sounds arcane and perhaps unimportant to some, but it is a very critical thing to an industry which will be having its subsidies reduced with regard to wool and angora, and so on.

Will you pursue that with vigor and keep us advised as to what you are finding there?

Ms. BINGAMAN. Senator Simpson, I will make it a point to review that and all other important pending cases in the Division promptly, if I am confirmed, to get up to speed on them and we will take such appropriate actions as we should.

Senator SIMPSON. I believe—and I have an interest in this—you were saying that you intend to pursue the issue of intellectual property questions and the difficulties in the international field of dealing with that. You and I spoke of that. That is something that intrigues you, is it not?



Ms. BINGAMAN. Senator, I would say that I think it is an important area of the economy. It is an important area of the law and it is something that attention should be focused on, and if I am confirmed I hope to be able to do that.

Senator SIMPSON. Well, I certainly wish you well, and I know that you will do a splendid job and I commend you. It is good to see your husband and your fine son, whom I have also come to know, and I wish you well. You will do a fine job.

Ms. BINGAMAN. Thank you very, very much, Senator. Thank you.

Senator METZENBAUM. Thank you very much, Senator Simpson.

Senator Moseley-Braun, we are very happy to welcome you this morning. We are happy to have you with us. If you have any statement or questions, we would be pleased to hear from you.

### OPENING STATEMENT OF SENATOR MOSELEY-BRAUN

Senator MOSELEY-BRAUN. Actually, I am not going to prolong this unduly. I had an opportunity to visit with Ms. Bingaman yesterday, and shared the fact that I am probably one of the few people who has read her book on the equal rights amendment.

Ms. BINGAMAN. You and I are in a class of two, I think. [Laughter.]

Senator MOSELEY-BRAUN. Specifically, one area that I would like you just to share your views, and that is, as we talked about yesterday, the Antitrust Division has been neglected, I guess is a kind word, in the last decade or more particularly in terms of its role in assisting American companies in terms of international competitiveness issues. So I guess I would just like to hear your views on how you see the role of the Antitrust Division in terms of the international competitiveness concerns, the issues of the charges of dumping and unfair trade practices and the like. How do you see the Division as functioning?

Ms. BINGAMAN. Senator, I agree with you wholeheartedly that the global economy has been thrust upon us. It has rushed at us with incredible speed, and international competition is here to stay. It is a way of life and we have to deal with it, and we have to work hard to have a level playing field for American companies around the world. It is a challenge, it is a real challenge, but it is one I am intensely interested in and if I am confirmed, I plan to work extremely hard in this area because I understand the importance of it.

Senator MOSELEY-BRAUN. Thank you.

Senator METZENBAUM. Thank you very much, Senator Moseley-Braun.

Ms. Bingaman, I want to just throw a caveat out with respect to this matter of hospital mergers and hospitals jointly buying equipment together. I indicated originally that I—and I still believe that we need some procedure in order to facilitate the questions that arise in buying a piece of equipment jointly.

On the other hand, I think there is some activity out there in the field of private hospitals, as well as nonprofits, wanting to merge in order to eliminate competition, in order to raise prices. All of us have to keep in mind that there still is this factor that when you have competition, the public is going to be served better and the prices will be kept lower.

I don't want to go so far and let the pendulum swing all the way over where we take the position that, well, any hospital that wants to merge, that is great, because in some instances it could very well result in higher prices for the consumer and some economies not being effected at the hospitals that could otherwise occur.

Let me change to another subject, please. In recent weeks, we have begun to see a wave of consolidation in the telecommunications industry. The traditional separation between the cable television business and the telephone business is beginning to erode. There are still some limits on the ability of cable and telephone companies to enter each other's business, but there is increasing discussion about loosening or eliminating those restrictions.

There might be some benefit to loosening these cross-ownership restrictions, but I am frank to say that I still have some concerns. Both cable television consumers and telephone customers are monopoly ratepayers. I don't want cable companies and telephone companies to finance their forays into new markets by raising the prices which they charge their monopoly ratepayers.

If telephone companies are going to enter the cable business, I want them to come in as competitors. I don't see how consumers will be helped by having telephone monopolies buying cable monopolies. U.S. West's recent purchase of a 25-percent stake in Time Warner and Southwestern Bell's acquisition of two cable systems in the Washington, DC, area suggest that the telephone companies and the cable companies might prefer to cooperate with each other rather than compete with each other.

In your view, what are the antitrust implications of this trend toward consolidating the telephone business and the cable television business?

Ms. BINGAMAN. Senator, I share your interest in what is happening in one of the most fundamentally important areas in our economy today, the entire telecommunications spectrum. It is of fundamental importance to consumers, to the competitiveness of the country, to the development of new products, and it is vital that competition be as vibrant as possible in every aspect of this multifaceted and huge field.

Senator, I honestly respect how complicated this area is. I have only been on the fringes of it. I don't have deep knowledge of the matters on which you speak. In fact, two of them, I believe, are currently pending before the Division, and it would not be appropriate to comment on it in any event. But I have not enough knowledge to be able to respond at this time with a general statement, but I can tell you that I understand the importance and one of the first things I want to do is get up to speed on this and—

Senator METZENBAUM. And do I interpret that response to indicate that you think that the Antitrust Division should be closely monitoring this situation and not just leave it as a regulatory issue which would be handled by the FCC and State regulators?

Ms. BINGAMAN. Senator, to my mind, there is no question the Antitrust Division has a vital role to play in this industry, and absolutely should be closely monitoring it. What the outcome of that might be in any particular case, I have no way in the world of predicting, but that the Antitrust Division has a crucial role to play, I absolutely agree.



Senator METZENBAUM. This morning's Post, as you probably noted, reported that the cable industry has settled an antitrust investigation which challenged the industry's efforts to thwart competition from alternative technologies such as wireless cable and direct broadcast satellite.

A probe was launched in 1990 after the biggest cable firms announced they were forming a joint venture to distribute programming via direct broadcast satellite. At that time, I wrote the Justice Department urging them to scrutinize this venture closely because I thought it was a preemptive strike designed to prevent DBS from becoming a viable competitor to cable.

Frankly, I am happy to see this settlement has taken place and that the programming market will be opened up, but I also believe it is a little late in the day. It is also noteworthy that this investigation seemed to be driven more by State attorneys general than by the Federal antitrust enforcement agency.

The fact is that anticompetitive conduct has been occurring for years in the cable industry and the Justice Department and the FTC just haven't been acting. They have been slow to act. Partly as a result of their inaction, Congress had to pass legislation which contained provisions designed to prevent the cable industry from withholding their programming from competing technologies. If there had been more vigorous antitrust enforcement up front, we might not have had to act, and I think that your response to my earlier question is very encouraging.

Now, Ms. Bingham, I will give you the opportunity to hit a home run in your hearing.

Ms. BINGAMAN. Let us see if I clutch. [Laughter.]

Senator METZENBAUM. As you know, baseball is the only professional sport that is exempt from our fair competition laws—that isn't totally true; of course, insurance also is. Its exemption was not authorized by the Congress. It was created by a Supreme Court decision in 1922.

I held a hearing on this issue last December. At that time, a number of expert witnesses, including Fay Vincent, a former baseball commissioner, testified that the antitrust exemption was not necessary. Those witnesses also questioned whether the exemption was in the best interests of the fans. It allows baseball's owners to make their decisions about the sport based solely on their financial interest. They cannot be held accountable by the fans for the decisions.

For example, the owners have proposed a new TV deal that would reduce the number of games on free network TV during the regular season and the playoffs. That decision is not subject to review by any public authority, so the fans have no effective way to raise concerns about it.

What kinds of things would you consider in determining whether baseball's antitrust exemption should be repealed, and do you have any thoughts on the pending legislation on that subject?

Ms. BINGAMAN. Senator, here, as in the area of exemptions generally which seems to come up frequently, as we have noted, I would start with the very fundamental proposition that exemptions are not favored in the antitrust laws. They never have been. They are exceptional, and the proponents of maintaining an exemption



or creating a new one should bear a heavy burden of justifying why that exemption is justified.

The baseball exemption, as the Senator notes, is unique among professional sports as a result of this Supreme Court case that is quite old at this point. I don't think there is any question that it is appropriate to look closely at this point at the baseball exemption. I don't have enough knowledge at this point of the industry or of professional sports generally to be able to tell the Senator exactly how that analysis should take place, but I agree with the Senator that a close look at this exemption is completely justified.

Senator METZENBAUM. Thank you very much. I am very pleased that our chairman of our overall committee has joined us. I might say that I have chaired the Antitrust Subcommittee just about as long as I have been in the Senate, and to the best of my recollection, almost with no exception, the chairman has been very supportive of antitrust legislation and effective antitrust enforcement.

I am happy to welcome you.

#### OPENING STATEMENT OF CHAIRMAN BIDEN

Senator BIDEN. Thank you, Senator.

Ms. Bingaman, congratulations.

Ms. BINGAMAN. Thank you very much, Mr. Chairman.

Senator BIDEN. I am delighted to see you before this committee. It has been the practice of this committee that the subcommittee Chairs that have not only jurisdiction, but an intense interest in the subject and a knowledge of the subject—and Senator Metzenbaum is one of those people—chair the nominations for the most significant persons involved in the area of their jurisdiction. So I am delighted that Senator Metzenbaum chaired the hearing, and if you can make it by Senator Metzenbaum, you can make it by anybody on this issue because he, quite frankly, has been, in the lean years, the guardian of this notion of antitrust when we had a few Presidents who concluded that there should be no such thing as antitrust legislation.

I have a number of questions I will not bore you with at the moment because I have had an opportunity to speak with you at some length over the last 4 months or 5 months regarding this position. I make no bones about it; I was a strong advocate of your getting this job, as you know. That is probably why it was slowed up. [Laughter.]

Ms. BINGAMAN. The Chairman is too modest.

Senator BIDEN. But, seriously, I have had the opportunity to speak to you and we have talked and you have indicated you are willing to continue to have discourse with this committee. You are accustomed to talking to Senators and you know how to handle us very well.

I would like to raise one issue with you for the record, and that relates to what has become, I think, a very confusing situation. As Senator Metzenbaum stated, I have been a strong supporter of our antitrust laws as an important means to promote and revitalize the American economy, as well as, quite frankly, America's international competitiveness. In fact, last year I chaired three hearings at the full committee on competition policy in the global market.

In the past, the differences between domestic and international policy were very easily distinguished. In the going-on-21 years I have been here, in the first 10 we were able to parse them out with precision; at least we all thought so. Antitrust law affected, we thought, only domestic markets, while trade laws and trade legislation applied to international markets. But in this new global economy, goods, services and capital flow freely across national borders and competition policy can no longer be characterized as only a domestic policy matters.

I would like to explore with you just for a moment, and with an opportunity to do it more fully at a hearing on this subject once you are in place and had a chance to get your feet wet and gain control of your staff and your operation—I would like you to discuss generally with me this notion of what role, if any, the Antitrust Division could play in promoting American competitiveness abroad.

By way of prefacing your answer, a friend of yours, Professor Petofski at Georgetown University, testified that he thought the most important thing that could be done with respect to competition policy is for the United States to vigorously enforce its antitrust laws. He suggested new defenses to antitrust violations, defenses that take into account factors that are related to international trade and efficiency.

Could you just give me a conceptual overview of how you view competition policy and antitrust policy, and where they mesh?

Ms. BINGAMAN. Senator, the issue you raise is at the heart of the challenge to this economy in the next 30 years, and whether we meet this issue or don't is going to determine the living standards, and really the success of our Nation—I really believe that—in the year 2030 or 2040. So there is absolutely no more basic and more crucial question for any of us to address, and antitrust law unquestionably has a role to play, and I think an important role.

Let me state briefly, as the Senator requested—the chairman requested—excuse me.

Senator BIDEN. Senator is fine. I have been trying to give away this chairmanship for a long time. [Laughter.]

Ms. BINGAMAN. I think there are two, at least, ways to think about it. One is the right of American firms to sell into international markets freely and not be blocked by any export cartels or import cartels, however you want to phrase it, that keep American companies from selling into foreign markets. Those are boycotts of U.S. goods. They are illegal if they are done in this country, and if they are performed by companies which do business in this country and yet prevent American firms from exporting into their country, I believe there is a good argument, a strong argument, that they are illegal as well under U.S. antitrust laws, and it is important to work hard on those cases.

I don't want to mislead anyone. Those cases are difficult to bring and to make, and part of the reason they are is because it is difficult to gain access to documents abroad, and one of the things we need to work on—and if I am confirmed, I pledge to the chairman and to this committee to make it a priority—is to find ways, either through bilateral treaties such as the one we have with Canada or other means, to obtain greater access to foreign documents and foreign witnesses, because the law as a theory doesn't do you much

good if you can't get the evidence to prove it. So, that is one part of the construct.

The second part is that American consumers need to be free from the impact of foreign cartels which may be selling into this market, and we need to work on ways to cooperate much more closely with the EC on its cartel investigations. Right now, we can't get the documents that the EC gets internally on cartel investigations even though they may concern companies selling also in the United States. The EC has a number of major cartel investigations going forward. Again, the documents are a problem. This time, it is goods coming into this country which may be sold at prices fixed.

So, Mr. Chairman, I think the question you address is crucial. It is fundamental and we need to address it, and if I am confirmed I hope and plan to make it a major priority.

Senator BIDEN. Well, I am very happy to hear you say that. I really think that we tend to be going about this, again, to use the word twice—and maybe in this case mildly inappropriately—in a conceptual sense, we have been approaching this the wrong way the last 12 years, in my view. I realize this is a generalization, but we seem to have concluded that the way to deal with international competitiveness and our disadvantages, where they exist, to eliminate the antitrust laws in this country.

The name of the game has been bigger is better. If we just didn't have these impediments—impediments, meaning the antitrust laws—then American companies, our multinationals—I never know what they are, but we would be in a better position to be able to compete. My instinct is the exact opposite and, apparently, your instinct, if you accept that characterization, which may be a bit unfair, of the policies of the last 12 years.

If the emphasis should switch the other way of using the existing antitrust laws to bring under the umbrella, if you will, foreign corporations and multinational corporations that may have some locus here, but also primarily flow from abroad, into and as part of the antitrust enforcement, it seems to me that is consistent with sound trade policy.

I am basically a free trader. I, basically, wish to see more goods and services crossing borders, fewer impediments, fewer barriers. I don't think that we generally—and I am not referring to the chairman of the subcommittee nor anyone, in particular, but we as a nation, in my view, I don't think have paid as much attention to that dimension of our trade problem.

It is my hope and expectation, with the permission of the chairman of the subcommittee, to continue to move in this area to explore competition policies and where they mesh with antitrust policies, and I thank you for your willingness to cooperate and for your answer.

I was going to say I will submit my additional questions in writing, but I know of your availability. I am not at all concerned about that, but there are things that, once you are confirmed, I would like to have you up informally with your staff to the full committee in a circumstance where we just sit down and go through, which I am trying to do with each of the division heads, and actually sit with the subcommittee Chairs and myself and the staffs of the full committee and the subcommittees, so we open up these lines of



communication on a very direct basis because there is a good deal this committee wants to do as a full committee.

As you know, there is no more active and productive member of this committee, and I am not being solicitous, than the chairman of this subcommittee. There is a lot to be done, and I am anxious to get off the ground on a positive note with open lines of communication.

I have said enough. I thank the Chair for his indulgence, and I congratulate you again. I know you have a heavy load to carry, being married to the Senator from New Mexico.

Ms. BINGAMAN. That is vice versa on some occasions, let me tell you. [Laughter.]

Senator BIDEN. Congratulations to you, Jeff, as well. I think it is a great appointment and I look forward to working with you.

Ms. BINGAMAN. Thank you so much, Mr. Chairman. I appreciate it, and I feel the same.

Senator BIDEN. Thank you.

Senator METZENBAUM. Thank you very much, Senator Biden. I think it is a great compliment to you, Ms. Bingaman, that so many members of the committee, including the chairman, saw fit to be here this morning.

Ms. BINGAMAN. I am deeply honored, I really am.

Senator METZENBAUM. It certainly bodes well for the confirmation process, and I hope to work out with the chairman some means of expediting the procedure. With that, we appreciate your being here. We look forward to your great work as the next head of the Antitrust Division of the Department of Justice.

The hearing stands adjourned.

Ms. BINGAMAN. Thank you, Mr. Chairman. Thank you.

[Whereupon, at 11:18 a.m., the committee was adjourned.]

[Submissions for the record follow:]

SUBMISSIONS FOR THE RECORD

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U.S. Department of Justice

Office of Legislative Affairs

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Office of the Assistant Attorney General

Washington, D.C. 20530

June 9, 1993

Honorable Joseph R. Biden  
Chairman  
Committee on the Judiciary  
United States Senate  
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed are the responses of Anne K. Bingaman to the written questions of Senators Cohen and Thurmond in connection with her nomination as Assistant Attorney General, Antitrust Division.

If we can be of any further assistance, please let us know.

Sincerely,

*M. Faith Burton*

M. Faith Burton  
Acting Assistant Attorney General

Enclosure

cc: Honorable Howard M. Metzenbaum  
Honorable Orrin G. Hatch

QUESTIONS FROM SENATOR COHEN

- Q. Under the Sherman Act, agreements involving joint conduct that "are believed to be so unlikely to produce redeeming consumer benefits are conclusively presumed to be unreasonable" and are completely prohibited.

I am concerned that our federal antitrust laws may be unduly hindering hospitals from entering into cooperative arrangements. The future of health care requires, in part, cooperative efforts between hospitals which have the enormous potential to contain costs, increase access and improve the quality of care.

I have introduced S. 493, the Hospital Cooperative Agreement Act, which authorizes ten 5-year demonstration grants to hospitals wishing to enter into cooperative agreements to share expensive medical equipment or services. This legislation also contains an antitrust exemption which allows participating hospitals to enter freely into the cooperative agreements without fear of litigation.

I have also introduced S. 223, the Affordable Health Care Act, which sets up a review process through which hospitals wishing to engage in cooperative agreements can be certified by the Secretary of Health and Human Services as likely to reduce costs, increase access and improve quality of care. Projects that have met these criteria could then be granted waivers from antitrust laws by the Department of Justice.

Do you agree that hospital collaborative agreements have the potential to significantly lower costs and improve quality of care?

Do you believe that antitrust exemptions should be created for hospital cooperative agreements that concentrate health care services in one facility within a specific geographic area?

Do you believe they should be created for hospital cooperative agreements that allocate services between local facilities?

- A. I agree that hospital cooperative agreements certainly have the potential to significantly lower costs and improve the quality of health care. In particular, joint ventures among hospitals to purchase new, expensive equipment that could be better utilized if shared have the potential to reduce costs without unreasonably restraining competition.

Antitrust exemptions covering agreements to concentrate health care services in one facility within a specific geographic area, or for cooperative agreements that allocate



services between local facilities should, I believe, be approached with caution. The antitrust laws have served us well for over a century, and are sufficiently flexible to take account of competitive conditions, market realities, and cost savings and other efficiencies deriving from particular conduct. For this reason, antitrust exemptions' generally are disfavored, and proponents of exemptions for particular industries or particular conduct appropriately bear the burden of justifying them.

Properly construed, the antitrust laws do not prohibit joint ventures that integrate the assets or skills of the participants in the joint venture and provide significant efficiencies that outweigh any possible anticompetitive effects. Such joint ventures are not conclusively presumed to be unreasonable, and are thus not completely prohibited.

Although a reasonable approach to legitimate joint ventures among hospitals is the proper rule, there does appear to be a real misperception among the hospital community that antitrust rules are overly restrictive. I believe this misperception should be addressed promptly by the antitrust enforcement agencies. If confirmed by the Senate, I plan as an urgent priority to undertake a serious effort to clarify the application of existing laws, which in fact permit activities which will keep health care costs down.

QUESTIONS FROM SENATOR THURMONDQuestion 1

- Q. Ms. Bingaman, I understand that you have called yourself a "pragmatist" in describing your antitrust philosophy. Please elaborate on your views of the purposes and goals of the antitrust laws and their importance to the competitiveness of U.S. businesses.
- A. Strong, head-to-head competition is the economic principle upon which this country has grown to greatness. The antitrust laws make a vital contribution to ensuring that such competition persists, enabling the United States to be more innovative and to create new and better goods and services. At the same time, the antitrust laws are flexible and broad, and allow consideration of the changes that occur in the marketplace, efficiencies, and the failure of a company or the increase in competition from foreign firms. Properly applied, the antitrust laws should enhance the competitiveness of U.S. firms both here and abroad.

Question 2

- Q. During the nomination hearing for the Associate Attorney General, Mr. Webster Hubbell testified that he had tried antitrust cases in court, but was "not an expert in the area of antitrust." In addition to having handled antitrust cases do you consider yourself an antitrust expert?
- A. During the past seventeen years, I have handled a number of antitrust cases involving Section 1 and Section 2 of the Sherman Act, and have represented both plaintiffs and defendants. Through that work I have become knowledgeable about the analysis, principles and doctrines of the antitrust laws and the cases interpreting those laws, as well as about the realities of big case litigation. If I am

confirmed by the Senate, I would hope that my experience as a litigator and overall familiarity with antitrust doctrine and precedent will be of significant benefit to the Antitrust Division and the Department of Justice.

### Question 3

- Q. Ms. Bingaman, health care reform still appears to be a priority of this Administration. Although the reform plan is still being developed, there is much discussion about increasing the cooperation between existing competitors and creating larger economic entities, such as larger groups of doctors and other providers. Please discuss whether you believe there would be a need for changes in the antitrust laws in order to permit these types of activities, and what sort of changes might be required.
- A. Cooperation between existing competitors, including in the form of mergers that create larger entities in the health care provider community, does not necessarily violate the antitrust laws. Those laws are sufficiently flexible to take account of competitive conditions, market realities, and cost savings and other efficiencies of cooperative conduct between existing competitors in legitimate joint ventures. Moreover, the joint Department of Justice-Federal Trade Commission 1992 Horizontal Merger Guidelines that would be applied to mergers between hospitals or other health care providers encompass consideration of the kinds of efficiencies that such mergers may well present.

Although a reasonable approach to legitimate joint ventures among hospitals is the proper rule, there does appear to be a real misperception among the hospital community that antitrust rules are overly restrictive. I believe this misperception should be addressed promptly by the antitrust enforcement agencies. If confirmed by the Senate, I plan as an urgent priority to undertake a serious effort to clarify



the application of existing laws, which in fact permit activities which will keep health care costs down.

In view of the flexibility of a proper antitrust approach to cooperative arrangements among health care providers, I believe that any changes in the antitrust laws as they apply to health care or any other specific industry should be approached with caution. The antitrust laws have served the economy well for over a century, and exemptions from them generally are not favored. Proponents of such exemptions appropriately bear the burden of justifying them.

#### Question 4

Q. Do you believe that U.S. antitrust law should apply equally to U.S. and foreign businesses, or should it seek to favor U.S. companies compared to foreign businesses?

A: I believe that the antitrust laws generally should be applied in a non-discriminatory manner to U.S. and foreign businesses alike.

#### Question 5

Q. Ms. Bingaman, I believe there is widespread consensus that many antitrust prohibitions, such as price fixing and bid rigging, should continue to be strictly enforced. However, there are other areas, such as "vertical" relationships between manufacturers and distributors, where increased antitrust enforcement might interfere with lawful and desirable business activities. If confirmed, do you envision antitrust enforcement in areas previously given little attention? In addition, please discuss whether in setting enforcement strategies, especially enforcement in new areas, you will be concerned with the potential chilling effects or costs which may be imposed on law-abiding businesses simply by raising uncertainty about where the lines will be drawn.

A. If confirmed by the Senate, I would fully, fairly and vigorously enforce the antitrust laws as enacted by Congress

and interpreted by the Supreme Court. In that regard, I note that vertical price-fixing or resale price maintenance has been per se unlawful since 1911 and remains a per se antitrust violation under recent precedent, including Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988) and Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984), and as such, would be enforced where warranted when facts of a violation are present as required.

At the same time, however, I am aware of the need not to chill procompetitive and law-abiding practices of businesses, including, for example, in the area of so-called vertical restraints. If confirmed, I would be careful in establishing enforcement strategies so that businesses are able to draw the line between legality and illegality of their actions under the antitrust laws.

#### QUESTION 6

- Q. Ms. Bingaman, what is your view of the McCarran-Ferguson Act, which provides certain antitrust exemptions for the insurance industry? What is your view of the antitrust exemption for professional baseball?
- A. The antitrust laws are central to our free-market economy. As such, exemptions from the antitrust laws are generally disfavored. Proponents of antitrust exemptions should bear the burden of justifying why, on the facts of a particular industry, the antitrust laws should not be applied to that industry.

With respect to the McCarran-Ferguson Act, my understanding is that the antitrust exemption contained therein is relatively broad. It would appear that an examination of

the need for the continuing broad exemption would be timely and appropriate. At this stage, I am not sufficiently familiar with all of the issues associated with such an examination. Therefore, I am unable to reach a conclusion regarding what the appropriate course of action would be after such an examination. However, if confirmed by the Senate, I would look at this issue closely because it is important to many Americans.

As to the exemption for the sport of baseball from antitrust liability, I would note that the Supreme Court decision it stems from was decided in 1922. Additionally, I understand that baseball is unique among professional sports in the United States in having such an exemption. It appears appropriate to examine this exemption and, if confirmed by the Senate, I would examine this issue closely.

#### Question 7

- Q. Ms. Bingaman, are there circumstances in which you believe that it would be proper to engage in the extraterritorial application of our antitrust laws? If confirmed, do you intend to seek out cases in which to apply U.S. antitrust laws in an extraterritorial manner?
- A. If confirmed by the Senate, I would, in appropriate factual circumstances apply U.S. antitrust laws to conduct abroad which harms U.S. businesses and consumers and is in violation of U.S. antitrust laws. This is the same policy adopted by my predecessor, James F. Rill, when he amended the Department's Antitrust Guidelines for International Operations to indicate the Department's willingness to bring these cases in appropriate circumstances. Because that policy comports with the Foreign Trade Antitrust



Improvements Act of 1982 and with longstanding Supreme Court precedent, I believe that such enforcement is required on an appropriate factual record.

If confirmed by the Senate, I would also intend to do everything reasonably possible to take appropriate action to uncover cases where U.S. exports have been limited or U.S. consumers harmed because of an antitrust violation by foreign businesses in violation of U.S. antitrust laws.

Question 8

- Q. Do you believe that in the past decade there has been too much criminal enforcement of the antitrust laws by the Antitrust Division?
- A. I do not at this time, before confirmation and before participation in the activities of the Division, have sufficient knowledge of particular criminal cases and enforcement programs to comment on the criminal enforcement record of the Antitrust Division over the past decade. However, I do believe that strong, vigorous enforcement, including criminal sanctions for antitrust violations, is a vital factor in ensuring that competition flourishes in this country by deterring hard-core antitrust violations. When a per se violation of the antitrust laws occurs, and the facts warrant criminal prosecution, I will not hesitate to prosecute antitrust crimes.

JOSEPH R. BIDEK, JR., DELAWARE, CHAIRMAN  
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 GORDON J. HUMPHREY, NEW HAMPSHIRE

## United States Senate

COMMITTEE ON THE JUDICIARY  
 WASHINGTON, DC 20510-6275

March 9, 1990

Mr. James Rill  
 Assistant Attorney General  
 Department of Justice  
 10th & Pennsylvania Ave, NW  
 Room 3107  
 Washington, D.C. 20530

Dear Mr. Rill:

It has been publicly reported that a consortium of the largest cable television companies have formed a joint venture -- known as K Prime Partners -- for the distribution of ten channels of video programming via GE American Communications, Inc.'s K-1 Ku-Band satellite. The cable companies involved -- TeleCommunications, Inc. (TCI), Time-Warner, Comcast Corp., Continental Cablevision, Cox Cable, Newhouse Broadcasting, United Artists Entertainment and Viacom -- have stated this venture is designed to "spur the general growth of the Ku-Band satellite industry and may provide an important transition to full high power Direct Broadcast Satellite [service] in the United States."

Both Ku-band and Direct Broadcast Satellite (DBS) technology are regarded as more marketable multi-channel video programming technologies than the current generation of satellite technology due to the fact that they utilize smaller home reception equipment. While today's C-band satellites require reception dishes measuring about three meters in diameter, the reception equipment needed to receive programming from the Ku-band satellites will measure only one meter. And DBS satellites of the future can utilize reception equipment as small as one foot in diameter.

When Congress deregulated the cable industry in 1984, DBS was viewed as a potential competitor to coaxial cable delivery of multi-channel video programming. However, DBS has yet to emerge as a competitive technology. A variety of reasons have been advanced for the delay in developing DBS, including uncertainty over access to programming. A former executive of Communications Satellite Corporation's now-defunct DBS subsidiary, charged that the cable industry withheld its programming from independent DBS program distributors ("DBS Disgruntled," Cable Television Business, March 15, 1987).

Together, the cable multi-system operators (MSOs) involved in the K Prime Partners venture control approximately 50% of the nation's cable subscribers. Three of the MSOs involved in the venture -- TCI, Time-Warner and Viacom -- are the industry's most significant vertically-integrated companies. Between them, these three vertically integrated cable companies own or control well over half of the top twenty-eight cable program networks in the country.

We are concerned that by controlling what is reported to be "the only U.S. Ku-band DBS satellite which will be in operation for the next three to five years" ("MSOs Near Agreement on K-1 DBS; Service to Dish Owners in Question," Satellite Business News, June 14, 1989), the consortium of cable MSOs will be able to restrict competition within the fledgling DBS business. More significantly, we are concerned that a DBS business which is dominated by the large vertically-integrated cable companies will never emerge as a competitive alternative to cable at the local level.

The cable companies involved in K Prime Partners characterize the venture as a means of "making DBS a reality in the United States." ("TCI plans to launch demi-DBS service," Broadcasting, January 29, 1990). The K Prime Partners joint venture will utilize the only existing transponder space left on GE Americom's SatCom K1, which will be operational through 1995. K Prime Partners' ability to utilize existing satellite space, gives the cable consortium an advantage over the other eight entities granted DBS broadcasting licenses by the FCC -- all of which would have to launch a special DBS satellite in order to deliver programming to subscribers:

[S]everal MSOs, including TCI, ATC, Continental, Viacom and Newhouse have been eyeing GE Americom's Satcom K-1 bird as a vehicle allowing easy entry into the high-powered DBS business. By launching such a business now, the MSOs could extend service to unwired areas, or those urban areas where large receive dishes aren't practical, while possibly preempting competition from parties outside the cable industry....With no other Ku-band satellites planned for launch in the next three to five years, the consortium apparently believes that it should take advantage of K-1's available transponders before someone else does ("MSO consortium close to announcing creation of Ku-band DBS service," Cablevision, September 11, 1989).

Executives from two of the cable MSOs involved in K Prime Partners -- TCI and Showtime -- have, in the past made statements to the effect that DBS should complement, rather than compete with, cable service. ("Biondi: Cable Companies Will Control DBS Business," Multichannel News, May 2, 1988; "Cable Execs Predict DBS May Kill Broadcast Affiliates," Multichannel News, April 18, 1988). Cable dominance of DBS raises the real possibility that this alternative technology will serve only unwired, rural areas and/or be limited as a supplement to -- rather than a competitive substitute for -- cable television.

Indeed, some industry observers have speculated that the K Prime Partners venture is "purely a defensive move on the [cable] MSOs part....":

Several executives noted that the MSOs, by simply tying K1 up, may be protecting billions of dollars in the perceived value of their cable subscribers. The current \$2300 to \$2700 value of a cable subscriber could decline from \$50 to \$200 in the financial community if an aggressive DBS service, which is viewed as a threat to cable, is launched, these executives said. The MSOs then, may view an investment of \$30 to \$70 million in a K-1 deal as an insurance policy which could save them billions ("MSOs



Near Agreement on K1 DBS; Service to Dish Owners in Question," Satellite Business News, June 22, 1989).

The K Prime Partners venture must be evaluated in the context of the cable industry's efforts to strengthen and consolidate its monopoly power at the local level. Since passage of the 1984 Cable Act, the industry has undergone an accelerated process of vertical integration, in which the largest companies have greatly expanded their ownership and control over the programming carried on their cable systems.

The cable industry has used its control over programming to stifle the development of alternative multi-channel video programming delivery technologies, such as wireless cable and the C-band satellite dish industry. (see attached March 6, 1989 letter from Senator Howard M. Metzenbaum to Assistant Attorney General Rule regarding proposed Time-Warner merger; and October 19, 1989 letter from Senator Howard M. Metzenbaum to Assistant Attorney General Rill regarding proposed TCI purchase of 50% interest in Showtime). Thus, the K Prime Partners venture must be viewed in light of the cable industry's persistent efforts to privilege one form of multichannel program delivery -- coaxial cable -- at the expense of alternative multichannel distribution technologies.

Accordingly, we urge the Justice Department to examine the competitive impact of the joint venture announced by K Prime Partners. In particular, the Department should examine:

- 1) Whether the venture is likely to restrain intra-modal competition in the fledgling DBS business by unreasonably raising the costs of entry for non-cable affiliated DBS service providers.
- 2) Whether the venture is a horizontal combination likely to eliminate or impede inter-modal competition (actual or potential) in cable franchised areas by forestalling or impeding the development of DBS as a competitive alternative to cable.
- 3) Whether the cable programming interests of the K Prime Partners venture participants will reduce competition in the subscription multi-channel video programming distribution business by impeding the ability of non-cable affiliated DBS service providers to obtain programming.
- 4) Whether the venture will reduce competition in the multi-channel video programming distribution business by reducing the incentives of the venture participants to make their programming available to non-cable technologies such as wireless cable and the C-band satellite program distributors that would compete with cable and K Prime Partners.

Finally, it should be noted that on February 21, 1990, another DBS joint venture involving General Electric was announced. The participants in this venture -- dubbed "Sky Cable" -- are General Electric/NBC, Hughes Communications, Rupert Murdoch's News Corp. (which operates DBS businesses in Europe and Japan) and Cablevision Industries (whose program holdings include four cable networks which it jointly owns with NBC). The Sky Cable deal, announced just two weeks after the K Prime Partners venture was revealed, has been cited by TCI -- one of the participants in the K Prime Partners venture -- as evidence "that the DBS marketplace will be highly

competitive." It is expected that Sky Cable will launch its DBS satellite in 1993 and begin offering programming to customers in that same year.

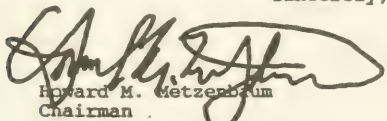
Three aspects of the Sky Cable deal are worth noting. First, the participation of General Electric means that one company is involved in the only two significant DBS ventures capable of getting off the ground within the next couple of years. Second, Sky Cable also involves the participation of a vertically-integrated cable MSO, Cablevision Industries, which has programming interests in over a dozen cable networks around the country. Third, Sky Cable's participants anticipate targeting customers who live in areas not served by cable and packaging their programming "as a supplement for homes with wired cable." The Sky Cable principals have stated that "Local cable operators will be given the opportunity to market Sky Cable's services along with their own program offerings."

These statements suggest that Sky Cable's plans do not include competing head-to-head with the local cable monopolies around the country. Thus, we do not believe that the creation of Sky Cable obviates the need for close scrutiny of the competitive impact of the K Prime Partners venture.

If nothing else, the willingness of the cable companies involved in the K Prime Partners venture to put millions of dollars into providing DBS service evidences its viability as a marketable multi-channel video programming distribution technology. And there can be no doubt that development of this multi-channel technology as a competitive alternative to cable service would benefit consumers, diminish cable's local monopoly power, and promote the purposes of the 1984 Cable Act. However, we have serious concerns about whether these objectives can be achieved if the largest cable companies in the country dominate the development and marketing of Direct Broadcast Satellite service during the next three to five years.

Cable industry involvement in DBS is not -- and should not be -- a prerequisite for its success as a marketable multi-channel technology. Indeed, such participation may well be a formula for stifling potential competition in the multi-channel video programming market. Accordingly, we urge you to scrutinize this venture closely.

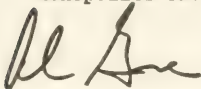
Sincerely,



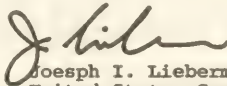
Howard M. Metzenbaum  
Chairman  
Subcommittee on Antitrust,  
Monopolies and Business Rights



Arlen Specter  
United States Senator



Al Gore  
United States Senator



Joseph I. Lieberman  
United States Senator

HMM/ch

Enclosures





# NOMINATION OF SHEILA FOSTER ANTHONY TO BE ASSISTANT ATTORNEY GENERAL FOR LEGISLATIVE AFFAIRS, AND FRANK W. HUNGER TO BE ASSISTANT ATTORNEY GEN- ERAL FOR THE CIVIL DIVISION

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WEDNESDAY, JUNE 16, 1993

U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The committee met, pursuant to notice, at 10:10 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Herb Kohl presiding.

Also present: Senators Heflin, Moseley-Braun, Hatch, Thurmond, and Grassley.

## OPENING STATEMENT OF SENATOR KOHL

Senator KOHL. This hearing will come to order. This morning the Judiciary Committee will conduct a hearing on the following Justice Department nominees: Sheila Foster Anthony, of Arkansas, to be Assistant Attorney General for Legislative Affairs, and Frank W. Hunger, of Mississippi, to be Assistant Attorney General for the Civil Division.

It is a pleasure to have all of you with us today. As is customary, we will hear first from Senators and House Members who wish to introduce nominees to the committee. But before we turn to them, let me state for the record that each nominee has completed a detailed questionnaire on his or her qualifications, experience, finances, and philosophy, and that the portions of the questionnaire available to the public will be printed in the record of this hearing.

[See Submissions for the Record following this hearing.]

Senator KOHL. We will also keep the record open for a limited time just in case members of the committee would like to submit written questions. And, of course, we will place in the record the full introductory statements of home State Senators and Congressmen.

At this point, we will place into the record a statement by Senator Pressler.

[The prepared statement of Senator Pressler follows:]

## PREPARED STATEMENT OF SENATOR LARRY PRESSLER

Thank you, Mr. Chairman, I would like to join my colleagues in welcoming to the Committee the Assistant Attorney General nominees: Mr. Hunger and Ms. Anthony. As is evident from their biographies, both nominees possess exemplary legal backgrounds and have demonstrated a sincere commitment to the law throughout their

lives. I commend them for this. Like my colleagues, I also congratulate them on their nominations and offer my support. If confirmed, as I expect they will be, I look forward to a productive working relationship which I am confident will be established and maintained with each of them.

Senator KOHL. We have a number of very distinguished Senators and a Congressman with us today, so let us begin with them. We have with us this morning Senators Bumpers and Pryor from Arkansas, who would like to introduce Ms. Anthony.

So, Senator Bumpers, would you like to start?

#### STATEMENT OF HON. DALE BUMPERS, A U.S. SENATOR FROM THE STATE OF ARKANSAS

Senator BUMPERS. Thank you very much, Mr. Chairman. This is getting to be the Dale and David show. We have a lot of Arkansans who have been appointed to very prestigious positions—not enough. [Laughter.]

It is indeed an honor to be here this morning. As many times as I have done this in the last 3 or 4 months, I can tell you, Mr. Chairman, that none have been with more pleasure than this morning.

I have known Sheila Anthony since I was first elected Governor of my State, became enchanted with her enough immediately to appoint her to the board of the Southern Arkansas University—I think perhaps only the second woman ever to serve on that board, where she served with great distinction. I watched her performance there. I watched her activities in the community where she lived at the time, El Dorado. I don't know of anybody who has ever acquitted themselves better in public life than Sheila Anthony.

As you know, she is the wife of former Congressman Beryl Anthony. I should also say that Vince Foster, who is deputy counsel to the President at the White House and one of the most outstanding lawyers Arkansas has ever produced from a very prestigious firm there, is her brother.

So her going back to law school after she came to Washington with her husband, going back to the American University College of Law where she graduated a few years ago, requires a great deal of determination, and she graduated there and immediately went into the law firm of Dow, Lohnes & Albertson where she practiced law in the field of intellectual property.

Mr. Chairman, I could go on, but I simply want to say that—and I will not list all the organizations she belongs now, and so on. I will submit my formal statement for the record, but I want to say that the President, if there is anything that will raise his fortunes, where some people think they are rather low at the time, his appointing people like Sheila Anthony—I promise you she will serve the President and the Nation well.

Thank you very much, Mr. Chairman.

[The prepared statement of Senator Bumpers follows:]

#### PREPARED STATEMENT OF SENATOR DALE BUMPERS

Mr. Chairman, Senator Hatch, members of the committee, I am pleased and proud to be here today to introduce to you Sheila Foster Anthony, my friend and President Clinton's nominee to be Assistant Attorney General for Legislative Affairs.

She comes to us from the respected law firm of Dow, Lohnes and Albertson, where she practiced in the area of intellectual property. She is a member of the Bar of the District of Columbia and the Supreme Court of Arkansas and is admitted to

practice before the U.S. Court of Appeals for the District of Columbia and the U.S. Supreme Court. Her hands-on experience in the law and her understanding of Congress will make her effective in her new post from day one.

Sheila hails from Hope, Arkansas, which has a record of producing distinguished public servants. After attending Randolph-Macon Women's College, she earned her B.A. in Government from the University of Arkansas in 1962. In 1981, she returned to law school, earning her J.D. from the Washington College of Law at The American University here in Washington in 1984.

Ms. Anthony has had long and successful political experience. She has served with distinction on the platform and executive committees of the Arkansas Democratic Party. In 1971, she was elected to the Union County Quorum Court. For many years before she began to practice law, she played a key role in the political career of her husband, Congressman Beryl Anthony of Arkansas. She taught school in Arkansas public school for several years, perhaps the most valuable sort of public service.

Sheila's most recent service has been as a member of the board of The Washington Center, a non-profit organization formed to provide and supervise internships and seminars for students interested in public service. This is just the latest in a string of community service activities stretching back three decades. I take great personal pride in one of these. As Governor of Arkansas, I appointed Sheila to the Board of Trustees of Southern Arkansas University. She was the second woman ever appointed to that position and she made me proud throughout her tenure on the Board.

The President has made a fine choice in Sheila Anthony. She is suited for this job by experience and character and I am very proud to recommend her to you. As members of the Senate, you will reap the benefits of your own wisdom by confirming her as Assistant Attorney General for Legislative Affairs. I am confident that she will serve the Congress, the President, the Justice Department and the people well.

Senator KOHL. Thank you, Senator Bumpers.

Senator Pryor.

#### **STATEMENT OF HON. DAVID PRYOR, A U.S. SENATOR FROM THE STATE OF ARKANSAS**

Senator PRYOR. Thank you, Mr. Chairman. Mr. Chairman, it is a pleasure to join my colleague, Dale Bumpers, this morning in introducing to the committee Sheila Foster Anthony. I am very happy to lend my wholehearted support to Sheila's nomination to be the Assistant Attorney General for Legislative Affairs.

Like our President, as Dale has said, Mr. Chairman, Sheila is a native of Hope, AR. When I reflected on the fact that this very small town in southwest Arkansas had produced another sparkling and talented public servant, I thought to myself, it must be something in the water. And then I thought, no, maybe it is something in the watermelon, because Hope, AR, is known as the watermelon capital of the world. Regardless, Mr. Chairman, we are proud of Sheila Anthony and I am proud, as Dale is, to have been her friend for a long time.

By the early 1980's Sheila Anthony had raised two lovely children, she had been a school teacher, and a political consultant to her husband, Beryl, who enjoyed a long and distinguished career in the U.S. House of Representatives. By that time Sheila had amassed enough accomplishments to fill an average lifetime. Yet, she chose not to coast through the remainder of her productive years. Instead, she decided to attend law school. She enrolled at the Washington College of Law at the American University where she received her J.D. degree in 1984.

After law school, as Dale has mentioned, she went on to become a senior associate with a very outstanding firm here in the city of Washington, and we think that Sheila's major midcareer decision



to become an attorney speaks volumes about her self-confidence, her strength of character, and her seriousness of purpose.

I would like to say, Mr. Chairman, that at no time have I ever recommended any nominee, for any position, that I am more proud of than the one I recommend today. We have before us an exceptional person, an exceptional nominee, and it is with great pride that I sit with her at this time of her nomination to this very, very important job. She is truly a person of common sense, of soul, of dignity, of compassion, of understanding of the system. She will be a splendid public servant, and I look forward to her confirmation.

Mr. Chairman, if I might say this, also, a personal note, I think it was about 2 years ago her father died, Vince Foster. I wish he could be here today to see his daughter, Sheila, assuming this very important role in her life.

I thank you, Mr. Chairman, and thank the members of the committee.

Senator KOHL. Thank you, Senator Pryor and Senator Bumpers. Your recommendations are likely to weigh fairly heavily in the process, and we excuse you now. We will call you back, Ms. Anthony.

Senator PRYOR. Thank you.

Senator KOHL. Thank you very much.

We have with us Senators Cochran, Lott, and Sasser, as well as Representative Thompson, who are here to introduce Frank Hunger. So we would like to ask you all to step forward, and we are going to ask Senator Cochran as the more senior Senator to speak first.

#### **STATEMENT OF HON. THAD COCHRAN, A U.S. SENATOR FROM THE STATE OF MISSISSIPPI**

Senator COCHRAN. Thank you very much, Mr. Chairman. Mr. Chairman, it is really a great honor and a tremendous personal pleasure for me to be here today to introduce my longtime friend, Frank Hunger, to the Judiciary Committee. Frank has been nominated to head the Civil Division of the Department of Justice as Assistant Attorney General.

He has been my personal friend for almost 40 years, and I can say to you that he is a person of unquestioned integrity, honesty, and professional competence. He graduated from the University of Mississippi as an undergraduate and served for a time as an officer in the U.S. Air Force. Then he returned to Ole Miss to begin law school. I had the great pleasure of sharing an apartment with him during his first year of law school. Then he transferred to Duke University where he graduated from law school 2 years later.

He clerked on the Court of Appeals for the fifth circuit for Judge J.P. Coleman, one of the truly outstanding members of that court who later became chief judge of the fifth circuit. Judge Coleman had been Governor of Mississippi, one of our really outstanding public figures of all time in Mississippi, and the fact that he chose Frank Hunger to be his first clerk, I think, is an indication of the respect and high opinion that he had for Frank Hunger.

Frank then joined a law firm in Greenville, MS, one of the best respected and most highly regarded law firms in our State, became a partner in very short order, and has established himself as one

of the finest trial lawyers in the State of Mississippi. He specializes in the handling of civil cases. He is a person who is professionally respected by lawyers throughout our State.

I think the President has made an outstanding choice in Frank Hunger to head the Civil Division of the Department of Justice, and I am very pleased to be able to recommend him to you and hope the committee will favorably report the nomination to the Senate.

Senator KOHL. Thank you very much, Senator Cochran.

Senator Lott.

#### **STATEMENT OF HON. TRENT LOTT, A U.S. SENATOR FROM THE STATE OF MISSISSIPPI**

Senator LOTT. Thank you, Mr. Chairman. I am delighted to be here to join my colleague from Mississippi in endorsing the nomination of Frank W. Hunger to be the Assistant Attorney General for the Civil Division. I think he is an excellent choice. The fact that he could survive a year sharing an apartment with my senior colleague from Mississippi certainly is extra qualification for this very important position.

I hail from the same part of the State originally and I know a little bit about his background, and I am very impressed with what he has accomplished in his life and I think he is going to be an excellent choice for this position. He certainly has the experience you need for this position. His education, his military background, his work with the very Hon. J.P. Coleman, the fact that he has specialized in civil litigation in trial practice with one of Mississippi's very best law firms, with 28 years of experience—he has been a very active member of the Mississippi Bar Association, and I believe has served in elected positions with the Fifth Federal Circuit Bar Association.

He is a fine man and I am very pleased to be here and endorse his nomination. We are very honored to have a Mississippian selected for this position and I hope he will have very quick confirmation by the full Senate.

Thank you, Mr. Chairman.

Senator KOHL. Thank you, Senator Lott.

Senator Sasser.

#### **STATEMENT OF HON. JIM SASSER, A U.S. SENATOR FROM THE STATE OF TENNESSEE**

Senator SASSER. Well, thank you very much, Mr. Chairman. It is a pleasure for me to appear here this morning with my colleagues from the State of Mississippi, but I must say to you that we in Tennessee also have some claim on Frank Hunger, and I am here today to assert that claim.

I first met Frank Hunger over 30 years ago. His late wife, Nancy Gore Hunger, was a roommate of my wife, Mary, at Vanderbilt University, and we had the great honor to participate in his marriage to the late Nancy Gore Hunger and I have known him well and favorably ever since.

I would say that he is a man, Mr. Chairman, of incorruptible integrity, of steadfast and sterling character. He is an accomplished and competent lawyer. He was made a partner after only 1 year

of practice in one of the best law firms in all of the State of Mississippi. Not the least of his accomplishments is he has a very distinguished and wonderful father-in-law, who was my political mentor in the State of Tennessee, Senator Albert Gore, Sr., who sits in this hearing room today.

Mr. Chairman, I want to raise my voice and join with my colleagues from Mississippi in recommending Frank Hunger, without reservation and wholeheartedly, to this post as Assistant Attorney General in charge of civil litigation. He has the experience, having tried literally hundreds of civil cases. He will be a hands-on, practical Assistant Attorney General, and I just am honored to be here today to recommend him wholeheartedly.

Thank you, Mr. Chairman.

Senator KOHL. Thank you very much, Senator Sasser.

Representative Thompson.

#### **STATEMENT OF HON. BENNIE THOMPSON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MISSISSIPPI**

Mr. THOMPSON. Thank you, Mr. Chairman. I am happy to join my other colleagues here in support of Mr. Hunger. As Frank's Congressman, I can, without reservation, say that he is eminently qualified for the position.

One of the ways you judge qualifications is by one's friends and one's enemies. His enemies in the courtroom say he is tenacious and that he is the worst kind of lawyer you can have on the other side. So, given that, and the fact that I have some very close friends in Greenville, MS, who think very highly of him—his record is above reproach—I wholeheartedly recommend Frank for the position.

Also, he has given the bar the broader stroke in that his firm has significantly donated service, pro bono, for indigent and other clients in the community. It is the kind of attitude and cooperation that we need in our State, and without reservation I am convinced that Frank is the best person for the job. It is nice to have a Mississippian put in the forefront of these opportunities. Arkansas is fine, but Mississippi helps from time to time.

Thank you.

Senator KOHL. Thank you very much, Representative Thompson.

Mr. Hunger, would you like to make a few remarks at this time?

Mr. HUNGER. Thank you, Senator. It is indeed an honor and a privilege for me to appear before you today as the nominee as the Assistant Attorney General for the Civil Division of the U.S. Department of Justice. For many years, I have wanted to be of public service, and for this opportunity I thank President Clinton and Attorney General Reno.

I also want to give a special thanks to my fellow Mississippians, Senator Cochran and Senator Lott, for appearing here with me today. Our friendship is long and strong and, as they have stated, it goes back many years to when we were all students together at the University of Mississippi. As Senator Cochran has stated, we shared an apartment and we were roommates, so I am most grateful for the things that he has not said as well as for those he did. [Laughter.]



I also want to thank my longtime friend, Senator Sasser, for being here. As he has stated, for many years Tennessee has been my second home and I feel a very special kinship to the people who live there.

To my Congressman, Congressman Thompson, I want to give a special thanks. I am most appreciative of his kind remarks and for his generous comments.

I would be remiss, Senator, if I did not recognize one person here today who more than any other has given me the inspiration to seek public service. I am immensely proud of my father-in-law, Senator Albert Gore, Sr. For many years, he served as a member of the U.S. Senate. To me, he sets the example of what an outstanding public servant should be.

His interests were always with those of the people and for what was best for our country. Throughout his career, he championed the causes of the underdog and the less fortunate. Integrity, courage, and honesty were the hallmarks of his career, and if confirmed by this body, I hope to always adhere to the same high standards that he followed throughout his career. When I think of a man and a public servant, the first name that always comes to my mind is that of my father-in-law. Thank you, Senator.

As stated, for the past 27 years I have been a full-time practicing attorney with a specialty in civil litigation. As I stated at the time of my nomination by President Clinton, I have been in the trenches in the practice of law. I have taken the depositions, I have produced the documents, I have appeared before the judges, and I have nervously awaited the jury verdicts.

Throughout my practice, I have always sought to maintain the very highest of ethical standards while at the same time providing my clients with the most efficient and effective representation. I hope to now apply those high standards on behalf of the preeminent of all clients, the United States of America.

I recognize that this is not the best of times for the civil justice system. The courts are overcrowded, the cost of litigation out of sight, and justice is all too often unduly delayed. All recognize that changes are needed, but the definition and direction of those changes is much in question. We now have millions of cases on the dockets of this country. Hundreds of thousands of new cases are filed every year and the amount of dollars involved staggers the imagination.

The United States of America alone is currently a party in over 200,000 cases, of which approximately 22,000 are on the docket of the Civil Division of the Department of Justice. To attempt to manage this situation is a staggering undertaking. We recognize that the problems are complex, and what may be fair and equitable to one group of citizens can simultaneously be unfair to others.

I know that there are no quick fixes. I do, however, want to be a part of the quest for the solutions, for our method of reaching a peaceful resolution to our disputes is at the very heart of our form of government, and I want to do everything that I can to assure that it continues for future generations in a way that truly guarantees justice for all.

Thank you, Senator, and thank all of my friends for being here today.

Senator KOHL. Well, we thank you, Mr. Hunger. And, gentlemen, we appreciate your coming here today.

Before we proceed with Ms. Anthony, Senator Thurmond is here and we would like to ask him for a comment or statement if he wishes to make one at this time.

#### OPENING STATEMENT OF SENATOR THURMOND

Senator THURMOND. Thank you very much, Mr. Chairman. I have no special statement to make. I expect to support these nominees.

Senator KOHL. Thank you very much.

I would like to ask Ms. Sheila Foster Anthony to make her way forward right now. Ms. Anthony has been nominated to be Assistant Attorney General for Legislative Affairs.

Would you raise your right hand, please? Do you swear the testimony you shall give in this proceeding shall be the truth, the whole truth, and nothing but the truth, so help you God?

Ms. ANTHONY. I do.

Senator KOHL. Thank you. Ms. Anthony, if any members of your family are here, we would be happy to have you introduce them to us at this time.

#### TESTIMONY OF SHEILA FOSTER ANTHONY, TO BE ASSISTANT ATTORNEY GENERAL FOR LEGISLATIVE AFFAIRS, U.S. DEPARTMENT OF JUSTICE

Ms. ANTHONY. Senator, my brother and sister-in-law, Vince and Lisa Foster, are here, and two of their children, my nephew and niece, Laura Foster and Vincent Foster III.

Senator KOHL. Would you all stand up so we have a chance to see who you are?

[The persons referred to stood.]

Senator KOHL. Well, we are very happy to have you with us this morning. Thank you.

Ms. Anthony, as Assistant Attorney General in charge of the Office of Legislative Affairs, you are, in a sense, the Justice Department's ambassador and lobbyist to Congress. What is your own view of your responsibilities at the Office of Legislative Affairs, and have you discussed with the Attorney General what your role will be?

Ms. ANTHONY. Yes, Senator. The role of my Office is to serve as the legislative liaison between the Congress and the Department of Justice. It also internally coordinates testimony that is given to this body and to the House of Representatives, and it also reviews legislation proposed by other departments with OMB and the executive branch agencies.

I will direct those efforts at the Office of Legislative Affairs and I will work with the Attorney General to develop and pass her initiatives that she proposes for the Department, as well as those of the President.

Senator KOHL. Ms. Anthony, at his confirmation hearing your predecessor, Lee Rawls, told the committee that he had two clear missions, "to make sure that Congress and the staff get prompt and reliable information, and to make sure that the Department speaks with a united and single voice." Do you agree with that?



Ms. ANTHONY. Yes, sir, I certainly do.

Senator KOHL. Ms. Anthony, you have a number of illustrious predecessors at Legislative Affairs, including John Bolton and Patricia Wald, who is now on the District of Columbia Circuit. Some of your predecessors saw themselves as facilitators and others as substantive negotiators. On this continuum, where do you see yourself? From being a facilitator to being a substantive negotiator, how do you see yourself functioning?

Ms. ANTHONY. I see myself as what I might term a responsive facilitator. Certainly, the Congress has many interests and needs, and I bring to that the strength of being intimately familiar with those, having been a spouse of a Member for 14 years. I understand the needs of the Congress. I hope to facilitate the responses to those needs and to enhance the relationship between the legislative and executive branch, both of which have the responsibility for effective government.

Senator KOHL. All right, very good. I have no further questions.

Ms. ANTHONY. Thank you.

Senator KOHL. Thank you very much.

Ms. ANTHONY. Thank you, Mr. Chairman. I appreciate your having me here today and expediting this hearing.

Senator KOHL. If you would just hold for a minute, let us see if Senator Thurmond wishes to ask any questions. He has no further questions.

You are excused.

Ms. ANTHONY. Thank you, Senator.

[The prepared statement of Ms. Anthony follows:]

#### PREPARED STATEMENT OF SHEILA F. ANTHONY

Mr. Chairman and members of the committee, I am deeply honored to be before you today. I wish to thank Senators [Bumpers and Pryor] for their kind introduction and generous remarks. They have been my Governors, my Senators, my friends and my heroes for more years than I care to admit. I also would like to thank the Senators and staffs for taking the time to meet with me prior to this hearing. My profound gratitude, of course, also extends to my family, especially to my husband of 30 years, Beryl Anthony, and to my friends for their unflagging support.

About a dozen years ago, I sat in this very hearing room with my dear friend Barbara Pryor and listened to the historic confirmation hearing for Sandra Day O'Connor. I was a first year law student (at age 40), realizing a long time goal, and as I listened to Judge Ginsburg's remarks yesterday and to Attorney General Janet Reno's remarks not long ago, I was again reminded of how little opportunity there was for women in the legal profession in the early 60's and 70's and how far we have come. The recurring theme from these accomplished women was that their success was grounded in support from their families, and I echo that same theme today.

It is the greatest honor of my life to have been selected by Attorney General Reno and nominated by President Clinton to serve as the Assistant Attorney General for Legislative Affairs. I consider myself extremely fortunate to have been asked to serve with individuals for whom I have the highest respect, in a position that will enable me to work with Members of Congress from whom I have not only respect, but also affection. For me, it is truly the best of all worlds.

The Office of Legislative Affairs has several missions: (1) devising and implementing the legislative strategy to carry out the Attorney General's initiatives requiring Congressional action; (2) acting as the Department's spokesperson for articulating the Department's views on Congressional legislative initiatives; (3) responding for the Department to all requests and inquiries from Congressional Committees, individuals members and their staffs; (4) serving as the entry point and point of coordination for all Congressional oversight activities involving the Department; (5) coordinating the appearance of Department witnesses and the interagency clearance of all Congressional testimony; and (6) handling Justice nominations requiring Sen-



ordinating the appearance of Department witnesses and the interagency clearance of all Congressional testimony; and (6) handling Justice nominations requiring Senate confirmation, e.g., federal judges, Assistant Attorneys General, U.S. Attorneys, and U.S. Marshals.

My career path has prepared me well for the role I have been asked to fulfill with this Administration. In addition to my life's roles as parent, practicing attorney, teacher, and involved citizen, I have been immersed in public service for 14 years as the spouse of and frequent surrogate for a former member of the United States House of Representatives. From this vantage point, I gained an awareness of the critical need for good relations between the legislative and administrative bodies on both federal and state levels. The legislative and executive branches bear equal responsibility for effective government, and I intend to do my part to facilitate accurate and timely responses from the decision makers at the Department of Justice to the U.S. Congress. I will try my very best to ensure that the Office of Legislative Affairs will not, under my direction, be a source of failed communications between Congress and the Justice Department. I will be mindful of the needs of the Congress and the destructive results of uncooperative attitudes, while carrying out my duties as the liaison between the Department and Congress.

Thus, if confirmed as the Assistant Attorney General for Legislative Affairs, I will be committed to serving the Department and working with the Congress in a respectful, accessible, and efficient manner. I will endeavor to ensure that the Office of Legislative Affairs provides only the highest quality work product to Congress, and that a spirit of cooperation prevails at all times.

Thank you. I would be pleased to address any questions you may have.

Senator KOHL. Our next nominee this morning is Frank Hunger, who has been nominated to be Assistant Attorney General of the Civil Division.

Mr. Hunger, would you please raise your right hand? Do you swear that the testimony you shall give in this proceeding shall be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. HUNGER. I do, sir.

Senator KOHL. We thank you. Mr. Hunger, if you have any members of your family here, we would be delighted to have you introduce them to us.

#### **TESTIMONY OF FRANK W. HUNGER, TO BE ASSISTANT ATTORNEY GENERAL FOR THE CIVIL DIVISION, U.S. DEPARTMENT OF JUSTICE**

Mr. HUNGER. Well, I have earlier made reference to my father-in-law, Senator Albert Gore, Sr., and I am very proud to have him here with me today, Senator.

Senator KOHL. Senator Gore, it is a pleasure to have you with us.

Mr. Hunger, you have been in private practice for your entire legal career and over 95 percent of your practice has been involved in civil litigation. In much of the litigation, you defended municipalities, large corporations, and many other companies. If confirmed, however, you will be moving from the role of civil advocate to civil prosecutor. What are the greatest challenges you face in making this transition and how do you plan to meet those challenges?

Mr. HUNGER. Senator, as you, the Civil Division of the Department of Justice represents the Government of the United States, its agencies, its employees, in general civil litigation. It is about as broad as the Government itself. Throughout my career, I have always tried to represent my clients in the most efficient and effective way, while at the same time maintaining the very absolute

highest of ethical standards. I will apply those same standards and the same efforts that I have for my clients in private practice on behalf of what I hope will be my new client, the United States.

Senator KOHL. Very good. Mr. Hunger, recently we have seen a lot of debate about what, if any, changes we should make to our Nation's tort laws. While I have never myself entirely endorsed any particular product liability legislation, I have generally agreed that this is an area that is ripe and necessary for review.

Have you, Mr. Hunger, given any thought to rewriting our Nation's tort laws, and if you could rewrite them, what would you change and what would you keep? I am talking about things like caps on damages, limiting joint and several liability, encouraging uniformity, and encouraging alternative dispute resolution—that or anything else that you would like to comment on.

Mr. HUNGER. Senator, that is a broad subject. I think that one thing that we must always keep in mind is to never lose sight of the fact that the courts of our country are for our people. I recognize that the cost of litigation has just become astronomical. In dealing with the problem of cost, we should always be certain that we don't deal out the people's right to come to court, regardless of their financial condition.

I am immensely interested in civil justice reform, and I am most familiar with a number of the subjects that you have just mentioned. Most of them are matters which are dealt with by the substantive law of the various States where the tort law is actually implemented into the trial court. Of course, if one is in Federal court, Federal procedures do apply and there are now reforms in place on some of our Federal rules.

I think that a number of the matters that you just mentioned are most worthy of consideration. I don't think anybody will really take issue with the fact that every effort needs to be made early on to give very careful and thoughtful consideration to the settlement of cases. I think alternative dispute resolution is a subject that we can all, and should give very serious consideration to and try and implement it whenever appropriate in a case.

You mentioned joint and several liability. I am most familiar with the concept. Interestingly, I think from a historical basis it comes originally from the English common law and at that point in time only one party could be sued, but if two were sued the negligence had to be concurrent. And it was not until 1848, I believe, from New York, the field code, where the first time, by statute, it arose that two parties could be sued together.

I believe by last count 35 States had reformed the joint and several liability. It is a matter that is under study. It is a matter that is not one that is readily susceptible to an easy solution, but it certainly needs to be studied and careful consideration given to the proposed solution. If confirmed, I would appreciate the opportunity of working with you and other members of the body on civil justice reform.

Senator KOHL. Very good. That is a good answer, Mr. Hunger. Mr. HUNGER. Thank you.

Senator KOHL. In the past few years, there has been a growth in the use of protective orders in product liability and environmental tort cases, as you know. Critics of this trend claim that

those orders prevent the public from learning about threats to public health and safety. This issue has again been debated during the recent controversy concerning silicon breast implants and side saddle gas tanks. In fact, that was a concern that Attorney General Reno raised herself with me the last time that we spoke in my office.

During your years in private practice, I am sure that you have had broad experience representing defendant corporations in cases involving protective orders, so I would like to ask you this, Mr. Hunger. How should a judge balance the public's right to know against a litigant's right to privacy?

Mr. HUNGER. Senator, during the years of my practice, I think I can conservatively state that I have probably entered into no less a hundred protective orders—in actuality, I am certain it is more than that—in lawsuits that I have been involved in.

Of course, the purpose of a protective order is to try and preserve matters of trade secrets or something that could be detrimental to one's business rights. That is the purpose of them. That purpose should never be abused, and I would be the first person to take exception with protective orders which were being implemented for the purpose of trying to keep from the public information pertaining to safety or hazards involved in products.

I have never had a protective order which was not reviewed by either a U.S. magistrate or a judge, and I think that that is an essential safeguard. If there is a bill that is currently before Congress on this, I would welcome the opportunity to study it and report back to you, or anyone, what my feelings might be on the subject.

Senator KOHL. Well, thank you. I am working on a bill and intend to drop it in some time in the near future. Before I do that, I would like to have a chance to review the bill with you and get your comments and suggestions as to how we can make it most effective and give ourselves the best chance of getting something passed.

Mr. HUNGER. Thank you.

Senator KOHL. Do you believe we can do something at the Federal level to protect both the public's right to know and the right of companies to maintain their trade secrets? Can we do a better job than we are doing right now, do you think? Do you think it is pretty finely balanced or do you think we can do a better job?

Mr. HUNGER. Personally, I have never had a problem with protective orders, Senator, and I have never had either the judge or opposing counsel raise a question to me about it. I have been very careful, however, to be certain that the orders were in every way proper and that there was nothing contained within them that I thought would even cause a problem in the sense of safety or hazardous condition if it were made public.

I know that my personal experiences on matters such as this are not all-encompassing and that there are instances, no doubt, where protective orders have been abused, and I would, as I say, like to see that that doesn't happen and would work with anyone on legislation that might be appropriate for the situation.

Senator KOHL. OK, thank you very much, Mr. Hunger. Mr. Hunger, in addition to the thousands of cases the Civil Division of Justice generates, you will be in a position to oversee thousands more



cases at the State and local level. What type of relationship do you feel the Assistant Attorney for the Civil Division should foster with State and local civil enforcement authorities?

Mr. HUNGER. Well, I think it should be as close as possible, Senator. I am very proud of the fact that at the time Attorney General Reno and I talked about this situation that I brought to her attention that I was the president-elect of a very large bar association composed of members from Texas, Louisiana, and Mississippi. These are attorneys who for the most part practice in the Federal courts of those three States.

This bar association is most interested in fostering better relationships between the bench and the bar. I found Attorney General Reno most supportive of my continued involvement with the association. It is strictly a pro bono type group to promote better workings between the bench and the bar. She strongly endorsed it, and I understand that this committee, through its staff, does, too, and through that organization, in particular, I want to work on good relationships between the lawyers who are out in the field who are with the U.S. attorneys' offices and Justice here in Washington.

Senator KOHL. Thank you, Mr. Hunger.

[The prepared statement of Mr. Hunger follows:]

#### PREPARED STATEMENT OF FRANK W. HUNGER

Thank you Senator Kohl. It is indeed an honor and privilege for me to appear before you today as the nominee to be the Assistant Attorney General for the Civil Division of the United States Department of Justice. For many years I have wanted to be of public service and for this opportunity I thank President Clinton and Attorney General Reno.

I want to give a special thanks to my fellow Mississippians Senator Cochran and Senator Tott for appearing here with me today. Our friendship is long and strong and goes back over many years to when we were all students together at the University of Mississippi. Senator Cochran and I were in fact roommates and I am most grateful for what he did not say as well as for he did. I also want to thank my long-time friend Senator Sasser for being here. For many years Tennessee has been my second home and I feel a special kinship with the people of that great state. To my congressman, Congressman Thompson, I give a special thanks. I am most appreciative for his kind remarks and for his support and generous comments.

I would be remiss if I did not recognize one person here today who more than any other has given me the inspiration to seek public service. I am immensely proud of my father-in-law, Senator Albert Gore, Sr. For many years, he served as a member of this body. To me he sets the example of what an outstanding public servant should be. His interests were always with the people and for what was best for our country. He always championed the causes of the underprivileged and less fortunate. Integrity, honor, and courage characterized his career and if confirmed by this body, I will adhere to the same high standards he has followed throughout his life. Thank you for being here, Senator.

For the past 27 years, I have been a full-time practicing attorney with a specialty in civil litigation. As I stated at the time of my nomination by President Clinton, I have been in the trenches in the practice of law. I have taken the depositions, produced the documents, met with the judges, and nervously awaited the jury verdicts. Throughout the years of my law practice, I have always sought to maintain the very highest of ethical standards while at the same time providing my clients with the most efficient and effective representation that I could give them. I hope to now apply those same standards and efforts on behalf of the preeminent of all clients, the United States of America.

I recognize that this is not the best of times for our civil justice system. The courts are over-crowded, the cost of litigation is out-of-sight, and justice is all too often unduly delayed. All recognize that changes are needed but the definition and direction of those changes is much in question. We now have millions of cases on the dockets of the courts of this country. Hundreds of thousands of new cases are filed every year and the amount of dollars involved in these matters staggers the imagination. The United States of America alone is currently a party in over 200,000 cases of

which approximately 22,300 are on the docket of the Civil Division of the Department of Justice. To attempt to manage this situation is a staggering undertaking.

The question we all ask is how can we best bring this situation under control while at the same time assuring fairness and equal access to the courts for all our citizens regardless of their financial condition. This Committee, the Congress, and the courts of this country have been and are daily working with these problems. Civil justice reform, proposed amendments to the rules of procedure, alternative methods for dispute resolution and other judicial initiatives are all commendable efforts to make justice truly more accessible for all of the citizens of this country. The problems are recognized but the proposed solutions complex. For what may appear to be fair and equitable to one group, can simultaneously be unfair to others. As a practicing lawyer who had dealt on a daily basis with these problems, I knew that there are no quick fixes. I do, however, want to be a part of the quest for the solutions. Our method of reaching a peaceful resolution of our disputers is at the very heart of our form of government and I want to do everything that I can to assure that it continues for future generations in a way that truly guarantees justice for all.

Thank you again Senators for permitting me to appear before you today.

Senator KOHL. Senator Grassley from Iowa, do you have any questions?

### OPENING STATEMENT OF SENATOR GRASSLEY

Senator GRASSLEY. Yes, I do. Thank you very much, Mr. Chairman.

Congratulations—

Mr. HUNGER. Thank you, sir. Nice to see you again.

Senator GRASSLEY [continuing]. Once again for your appointment, and I thank you for taking time out of your busy schedule to stop by and, I suppose, not only see myself, but a lot of the other members of the committee so we can become better acquainted with you and wish you well.

As you know from some discussions we have had not only with you, but a lot of other people who are up for political appointments within the Department of Justice, I have brought up some concerns that I have had about qui tam whistleblower lawsuits under the False Claims Act. I think you might know, but just for the history of everybody, this sort of false claims legislation was first passed during the administration of President Lincoln, and I got some amendments in 1986 to make it stronger to allow private parties with knowledge of fraud in the Government to file suits in the name of the United States.

We have collected nearly \$500 million just in the 6 years that that has been enacted, probably most of that within the last 3 years—all of it within the last 3 years; just last December, \$110 million from one—not Defense; it was related to the health industry. So I think it shows the utility of a supplement to the executive branch enforcement of protecting the public fisc.

Now, unfortunately—and this has nothing to do with you or the President or Janet Reno or anybody who has been up here, but it seems to me like past Departments of Justice, and the Civil Division in particular, has shown increased resistance to qui tam lawsuits, if not outright hostility.

The Department, which has a statutory right to join qui tam cases as a coplaintiff, regularly tries to cut the whistleblower out of the case by arguing for the dismissal of the relator at the outset, trying to limit the relator's ability to collect his share of the recov-



ery, and keeping the whistleblower in the dark about the progress of the case.

This adversarial attitude culminated in a speech last October by the outgoing Attorney General to the American Corporate Council Association in which he questioned the constitutionality of the act and complained that whistleblower lawsuits constitute "a burden, and a severe burden, we believe, on contractors who are defending them." I didn't say when that quote began, but that is a partial quote from then Attorney General Barr.

So to you, sir, if confirmed, to what extent—and maybe I ought to ask more bluntly, can I count on you to run a civil division which is more concerned about bringing whistleblowers with knowledge of fraud on the taxpayers in from the cold than with alleviating burdens on defense contract ripoff artists and the architects of Medicare scams?

Mr. HUNGER. Senator, as you know, under the leadership of Attorney General Reno, I anticipate that you will see a change in the attitude of the Department of Justice on the subject of qui tam cases. As a citizen of this country, I think that you and the other members of this committee are due a great thanks for what has been done on qui tam.

I have not lost sight of the fact that that \$500 million that came into the Treasury resulted in a benefit for the people of this country, and it only came about after fraud has been established. So, sir, I guess I would echo the words of, I believe it was Judge Reuben from the Central District of Ohio in the *Webber* case when he stated that he could not understand why the Department of Justice appeared to be more of an adversary than an ally. I expect that you will see that from this time on the Department is going to be more an ally than an adversary.

Senator GRASSLEY. Well, that is a very strong answer, and I thank you particularly for saying what Judge Reuben said because I think that puts in a nutshell very much some problems that I have tried to describe here. Maybe a little more specific with one aspect of it, current Justice Department policy appears to be that whistleblower lawsuits should be curtailed on the theory that any sharing in the recovery by a whistleblower constitutes a diversion of government funds.

Of course, that is a view which is directly contrary to our congressional intent. I think I can show you that with lots of speeches that people have made on this. Do you share that view, or do you agree that Congress has legitimately concluded that providing whistleblowers a share of the Government's recovery is a necessary and effective way to bring information about fraud to light?

Mr. HUNGER. When I think about the whistleblower's share, I also think about the fact that for every dollar that the whistleblower may receive, the United States of America receives no less than \$7, Senator. I would like to delve a little more into the possible consequences of that, but certainly on the face of it it seems most reasonable to me.

Senator GRASSLEY. I consider that a very positive answer, and good to hear, because the Department seems to have concluded that its primary role in qui tam cases is to minimize whistleblower participation in the prosecution of recovery.



Do you believe that whistleblowers who bring evidence of fraud to the Government's attention through qui tam lawsuits should be encouraged, not discouraged?

Mr. HUNGER. Yes, sir.

Senator GRASSLEY. So you see whistleblower lawsuits as a useful supplement to the work of the Civil Division rather than an undue interference with the Division's execution of its prosecutorial authority?

Mr. HUNGER. Of course, each case will stand on its own footing, Senator, but as a general proposition I, as stated earlier, expect that you will see the attitude of the Department of Justice such that there will be cooperation on qui tam suits.

Senator GRASSLEY. OK, thank you. Some in the Civil Division have expressed doubts about the constitutionality of whistleblower lawsuits. It has taken a great deal of effort on my part just to maintain the Government's neutrality on that issue. Now, I should say that would have been during previous administrations.

Attorney General Reno and Solicitor General Days both expressed their inclination in favor of the act's constitutionality. I want to say inclination. They have not given a clear-cut statement to that effect. In fact, I think I would still characterize them as still reviewing it because I haven't heard a definitive statement.

Do you agree with me that Congress can constitutionally deputize private citizens with knowledge of fraud to file suits in the name of the U.S. taxpayer?

Mr. HUNGER. Senator, I certainly don't want to evade your question, and I recognize that there is a presumption of constitutionality on acts of Congress. Having never handled a qui tam case myself in depth, I would like to study that a little more.

Senator GRASSLEY. Could I focus from the standpoint of questioning, then, maybe on just a little bit of history and partly to bring it to your attention as much as to ask a question, but it is in the form of a question. Do you at least agree that it is a bit of a stretch for Justice Department officials to argue that qui tam lawsuits, a legal mechanism that has been employed in Federal statutes since the 1820's and that has been a part of Anglo-American law since the Middle Ages, is unconstitutional?

Mr. HUNGER. I understood, Senator, that the constitutionality of the statute had been challenged on earlier occasions, with nearly every court ruling it was constitutional.

Senator GRASSLEY. That is right, it has, and upheld every time.

Mr. HUNGER. And upheld on every occasion. I don't know that it has ever reached the U.S. Supreme Court, but if we look at lower court precedent, certainly it would be constitutional.

Senator GRASSLEY. Let me tell you just a practical aspect of the question in getting the Department to be very much pro-qui tam in regard to constitutionality, and that is that it will save the Senate some work because whenever there has been a question of constitutionality brought up in these various district and courts of appeals, the Senate counsel has done a very good job, I think, of representing congressional intent and the constitutionality of it, more so than even the presumed constitutionality of it, and has argued that case.

I suppose the Senate arguing it is a little bit less forceful to the judge than if you would argue it, and so we would like to have the Justice Department come around to the point of view that, no doubt it, it is constitutional, and argue it from the standpoint of more force and effect, as well as less work for the Senate counsel.

Mr. HUNGER. Well, you have some very able and competent attorneys here in the Senate with your committee that have looked at that question and I, as I have stated, anticipate that in the future they may be joined by equally highly capable and able attorneys in the Department of Justice.

Senator GRASSLEY. I suppose that if I asked you the ultimate question on this that you would still legitimately say that you can't give a yes or no answer, but will you argue the act's constitutionality in cases where the issue is raised?

Mr. HUNGER. You anticipated my answer, Senator. I would want to study it a little more.

Senator GRASSLEY. I am, of course, very pleased to hear the positive comments that you have made so far about whistleblower lawsuits. With a constructive attitude toward qui tam relators in the Justice Department, the taxpayers and the Treasury, of course, will benefit, and I hope in geometrical proportions to what we have the last 3 years from money coming into the Federal Treasury.

Unfortunately, large bureaucracies like the Justice Department are often resistant to change. As you pointed out in your visit with me in my office, Federal District Judge Carl Reuben of Cincinnati recently noted the long-term hostility of the cases. I want to quote more directly here from him. He wrote that:

Pattern of behavior in these cases by the Department of Justice has always been a mystery. The Department of Justice has considered such individuals as adversaries rather than allies. This is not the first case where this court has noted the antagonism of the Justice Department to a whistleblower. The reason continues to be unknown, but the attitude is clear.

Could you promise me that, when confirmed, you will get to the root of your office's institutional hostility to whistleblower lawsuits and do whatever it takes to bring the Civil Division's stance back in line with congressional intent and sound public policy? Maybe you could be a little bit specific on what steps, if you agree with me, you might be willing to take with the people that will be below you.

Mr. HUNGER. Well, of course, Senator, Judge Reuben in that opinion was making reference to a Department of Justice which was being run by someone other than Attorney General Reno. Ms. Reno is going to revisit this whole issue and, I feel confident, will solicit information from Associate Attorney General Hubbell and hopefully from myself and from others who are on the staff level, and attorneys in the Department, on the question. And as I have stated earlier, I think you are going to find a difference in attitude by this current Justice Department than was displayed by the others.

Senator GRASSLEY. In a bipartisan approach, Congressman Berman and myself are introducing legislation on some technical changes, very technical, that I would ask you to take a look at, not give me any judgment right now, but just to work with us on.

Mr. Chairman, I didn't know whether the lights were on or not. They are all off, I suppose, is what you are telling me.

Senator KOHL. You are doing fine.

Senator GRASSLEY. I am sorry. I will defer.

Senator KOHL. Thank you very much, Senator Grassley.

I would like to call on our distinguished colleague, Senator Hefflin.

### OPENING STATEMENT OF SENATOR HEFLIN

Senator HEFLIN. Well, thank you, sir. I want to congratulate the President and the Attorney General for your selection.

Mr. HUNGER. Thank you, sir.

Senator HEFLIN. In my time being in the Senate, I don't believe that there has been anyone who has headed the Civil Division that has the background and the qualifications that you have.

Mr. HUNGER. Thank you, Senator.

Senator HEFLIN. I am delighted to see that a trial lawyer who has been in the pit and who has been trying lawsuits dealing with the problems that human beings deal with and are involved in dealing with the Government—and I think the fact that you are a member of the American College of Trial Lawyers is a very significant recognition of your abilities, and we look forward to working with you.

Mr. HUNGER. Thank you.

Senator HEFLIN. There are a number of questions in the whole Civil Division that we could get into, and I don't want to take the time to do it. Senator Grassley has brought up the whistleblowers issue regarding the False Claims Act.

Maybe I will say this as to what I consider a warning to you. I think that the Civil Division in the Department of Justice—the career attorneys have become mired down in the protection of the status quo. On most legislation that is proposed they have a “bible” upon which they take on most every position, and largely they don't want to disturb the relationship that the Department has with the various other departments. They take positions opposing legislation that may be innovative or new because it may disturb the status quo.

This may be an unfair charge, but in my judgment the whole thing needs to be looked at and hopefully be reviewed on what has been the position relative to legislation over a long period of time. Just as an illustration, we had a bankruptcy bill last year that the Department opposed because it had an innovative idea regarding a chapter II experiment on behalf of small businesses. Even on the floor of the Senate where there was a threat of a veto coming from the Department, the bill passed 97 to 0, which was a pretty good indication that the entire Senate did not think too much of the Department's opposition.

I don't want to get into all of the details of this, but there are a lot of things that are coming along—administrative law judge reorganization, trying to give some independence to these executive branch adjudicators; the whistleblower matter; and a great number of other issues.

There is one matter that I hope that you will look into, and we will probably have to move very rapidly—I have had some discus-



sion with you—and that is the proposed changes in the Federal Rules of Civil Procedure that have been proposed. You know, we have a timeframe in which to act. It is my understanding that over on the House side, the Subcommittee on Courts is having a hearing today relative to it.

I have had a number of interested parties that have raised some questions about the proposals that have come forward, and I hope you will look into that and maybe we can arrange a hearing as soon as possible in that regard.

Mr. HUNGER. I would appreciate that.

Senator HEFLIN. That is all I have.

Senator KOHL. Thank you very much.

Senator Hatch.

### OPENING STATEMENT OF SENATOR HATCH

Senator HATCH. Well, thank you. Welcome, Mr. Hunger.

Mr. HUNGER. Thank you, sir.

Senator HATCH. We are happy to have you here. I enjoyed meeting you in my office the other day. There is one thing I would like to bring up because it will be under your jurisdiction.

Over the past, really, 13 years or so, in a bipartisan way, Democrats and Republicans in Utah have worked very hard to pass the Radiation Exposure Compensation Program to help people who were really negligently exposed to low-level ionizing radiation during the 1950's and 1960's in the tests out there, and these are called downwinders.

One of the problems that we have here is that the administration has taken the last \$75 million in that program which was meant to take care of all claimants under that bill and placed it in the Legal Services Corporation funding. Now, I understand the desire to help Legal Services, but if you are taking it away from humanitarian concerns that everybody in the Government has acknowledged in a bipartisan way will right the wrongs of what was done during those 1950's and 1960's years when they could have warned these people, they could have protected these people, they could have notified these people—if you take those funds away, I think it would be a tremendous breach of trust, a tremendous breach of obligation of this Government.

Regardless of how important the Legal Services Corporation is, I think that trust relationship between the Government and its people who are not being paid very much by way of compensation—I think that breach of trust would be just unacceptable, I think, to all of us up here.

We had to go through just countless hearings. We had to establish various standards. We had to establish and fight all the way through to show that the Government was negligent, that it really knew what it was doing, that it should have made different things. We finally established through radio-epidemiological tests how these matters should be handled. The whole world has paid attention and is following the information and the results of those hearings. Now, we find that there is only \$250,000 left to resolve the other problems.

So I would appreciate very much your reviewing the operation to determine whether any claimants were unfairly denied benefits

solely because of their age, place of residence, occupation, or other regulatory exclusion. When we wrote the bill, we could only go so far, and literally I believe there are people who have been excluded from compensation because of the narrow writing of the bill who probably should be given some consideration.

I am not even asking you to make that right, although I would like to do that. What I am asking is that we live up to the responsibilities that we undertook as a government, both the executive branch and the legislative branch, here a few years back.

It is reported that some individuals may have been properly yet unfairly denied benefits because they lived in an excluded county or failed to meet specified age requirements at the time of their exposure to radiation. So I would like you to review those cases, if you will.

Mr. HUNGER. It will be done.

Senator HATCH. I would appreciate that, and I would like you to report to me on your findings, if you will.

Mr. HUNGER. Certainly.

Senator HATCH. Thank you. There may be some claimants who should be entitled to benefits, but were unfortunately excluded from this very important program. Now, just yesterday, as I said, I was made aware that the administration is proposing a reduction in payments to the radiation exposure compensation trust fund, and I was really troubled when I learned of this development. Quite frankly, I really don't find that reduction advisable.

In essence, the administration is taking from the pocketbooks of those who really have suffered and who are owed in this particular case—trust funds for humanitarian payments for victims of radiation exposure that should never have suffered—and giving it to the Legal Services Corporation—a worthwhile and noble thing if you could get the moneys elsewhere, but certainly not taking it from people that the Government owes.

If you will look at that and report back to me as soon as possible, I would be very appreciative.

Mr. HUNGER. Senator, of course, I am not familiar with the details, but you have my assurance that I will promptly look into it and get back to you just as soon as I possibly can.

Senator HATCH. Well, I appreciate it. I don't want one person to have to be in anguish over fair compensation. We have basically provided \$50,000 for people who have suffered or died from these problems, and in the case of minors where it was even more blatant \$100,000 per person. It is really a very small cost to the Government compared to the suffering and the difficulties that these people went through.

So I appreciate your being willing to look at that and I hope that we can resolve this particular funding problem because it would be catastrophic if the Government failed to live up to that.

Mr. HUNGER. Thank you, sir.

Senator HATCH. I welcome you and look forward to working with you. I think I will enjoy working with you. You are an excellent lawyer, you have a tremendous background. I think you are an excellent choice for this position and I intend to work very closely with you and to help you in every way I can.

Mr. HUNGER. Thank you very much, sir, and you have my assurance that I will do everything in the world that I can to work with you, and I know it will be a pleasure and a privilege. Thank you.

Senator HATCH. Well, same here. Thanks.

Senator KOHL. Thank you, Senator Hatch.

Senator Moseley-Braun.

#### OPENING STATEMENT OF SENATOR MOSELEY-BRAUN

Senator MOSELEY-BRAUN. Thank you very much, Mr. Chairman. Mr. Hunger, I am delighted to see you again.

Mr. HUNGER. Nice to see you.

Senator MOSELEY-BRAUN. I want to thank you for stopping by and for the chat that we had. Quite frankly, coming out of our earlier conversation, I have probably what is the most softball question you have had all day, which is why do you want to be the Assistant Attorney General for the Civil Division.

Mr. HUNGER. Well, when you hear that there are 23,000 cases on the docket, I think your question is most appropriate. Senator, I genuinely want to be of public service. This country has been awful good to me, and the way that I was raised is that it is an honor to be a part of the Government of our country. I want to give something back, and I genuinely look forward to that and feel that in this particular position I can best serve my country and its people, and that is what I want to do.

Senator MOSELEY-BRAUN. Well, that reflects the kind of conversation that we had when we spoke, and I was really very much taken with the patriotism, and actually the fundamental understanding of what public service is about that you expressed in our conversations. I was very much impressed with that and I wanted to have the opportunity for you to share that view with the rest of the members of this committee, certainly.

Mr. HUNGER. Thank you, ma'am.

Senator MOSELEY-BRAUN. To get from the general to the specific, I have been concerned and have raised questions previously about what has been called the Inslaw case. I don't have an awful lot of information about it, just what has come up in our briefings, but certainly I have been concerned. I asked one of the previous nominees for the Department of Justice if they would report back to us, and I was assured that they would.

I don't know if you are familiar with the Inslaw case. It has to do with what looks to me, just as an uninitiated viewer, like some real skullduggery involved in depriving some private citizens of fair treatment by the Department. If that is the case, then certainly we would want to explore it. We would want to look into it and we would want to make certain, to the extent possible, that justice was done.

I wanted to ask you, if you have become familiar or have familiarized yourself yet at all with that case, what you see in terms of the Department's response to that case, and also whether you can share any information regarding the report which I was told would be shared with this committee—what the timing of the report is going to be or whether you know what the status of that report is.

Mr. HUNGER. Senator, I know nothing about the case other than the fact that it is, I think, in the Department of Justice. I have had



no participation whatsoever in any matter involving Inslaw, none. I am sorry, but I just know nothing about it.

Senator MOSELEY-BRAUN. Well, then, I guess the followup question is, Would you look into it?

Mr. HUNGER. Yes, ma'am.

Senator MOSELEY-BRAUN. Again, we were told that there would be a report forthcoming. I have not been advised as to when that report would be forthcoming, but if you could look into that, I would appreciate it.

Mr. HUNGER. It will certainly be done.

Senator MOSELEY-BRAUN. Great, thank you. One of the other issues that we discussed yesterday, or whenever it was—I lose track of the time—when we had our conversation had to do with the use of civil fines and the potential for using civil fines as an adjunct to our law enforcement efforts. I would want to explore with you your views about using the potential of civil fines as a way of assisting our law enforcement efforts overall, and specifically with regard to cases that don't rise to the level of a criminal prosecution.

Mr. HUNGER. Well, I think that that has considerable potential to be used as an effective tool for enforcing the laws. There is a fraud section within the Department of Justice to deal with questions such as those that you have just raised, and I will certainly make every effort to see that that law is fully complied with and efforts made to implement it in all appropriate occasions.

Senator MOSELEY-BRAUN. Thank you. Then, finally—again, I didn't have a lot of questions and didn't want to take a lot of your time this morning. I certainly agree with my colleagues that this is a sterling nomination. I congratulate the President as well for this nomination. You actually have the distinction of being one of a limited category of nominees—when Senator Biden told me that the nominees would all be noncontroversial, I am happy to say that we can hold you up as an example of a noncontroversial nominee, and I am delighted to have a chance to visit with you again today.

Mr. HUNGER. Thank you, and it is an honor to be with you.

Senator MOSELEY-BRAUN. Thank you.

Senator KOHL. Pardon me, Senator Moseley-Braun. I have to leave, so I would like you to just conclude the hearing. But before I leave, I would just like to announce that for scheduling reasons, Eleanor Acheson, who is nominated to head the Office of Policy Development, will be rescheduled next Tuesday at 10:30 a.m., along with Walter Dellinger, and Senator Biden will chair that hearing.

Mr. HUNGER. Thank you, sir.

Senator KOHL. Thank you very much.

Whenever you are finished—

Senator MOSELEY-BRAUN. Well, I think actually I had one other question on tort reform. I think we can resolve that later. I, Mr. Chairman, am again delighted with this nomination, and I understand we have 5 minutes left to vote on a matter on the floor.

Senator KOHL. Eleven minutes.

Senator MOSELEY-BRAUN. Eleven minutes, well, OK. You guys haven't showed me the shortcuts over to the floor yet, though, so I would not want to miss one. I haven't missed a vote yet and I don't want to miss any.

Senator KOHL. All right. Well, we thank you very much, Senator Moseley-Braun.

Mr. Hunger, ladies and gentlemen, this hearing is closed.

Mr. HUNGER. Thank you. It was an honor.

[Whereupon, at 11:16 a.m., the committee was adjourned.]

[Submissions for the record follow:]

## SUBMISSIONS FOR THE RECORD

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### I. BIOGRAPHICAL INFORMATION

1. Full name (Include any former names used.)

Sheila Foster Anthony; Sheila Foster (Maiden name)

2. Address: List current place of residence and office address(es).

Home:

3900 Macomb St., N.W.  
Washington, D.C. 20016

Office:

U.S. Department of Justice  
Office of Legislative Affairs  
10th & Constitution Ave., N.W. Room 1145  
Washington, D.C. 20530

3. Date and place of birth.

11/8/40 - Hope, Arkansas

4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

Married: Beryl F. Anthony, Jr.  
Attorney/Partner  
Winston & Strawn  
1400 L. Street  
Washington, D.C. 20005

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

Randolph-Macon Woman's College  
University of Arkansas

1958-60  
1960-62 BA '62  
Major - Government  
Certificate in  
Secondary Education  
1969-70  
Certificate

Southern Arkansas University  
(Speech Correction Program)  
George Washington University  
(Legal Assistant Program)

1980-81 Certificate

Washington College of Law,  
American University  
Georgetown University Law School  
(two courses)

1981-84 JD '84  
1983-84



6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

1962-63 Public Schools, Springdale, AR - classroom teacher  
 1969-70 Public School, El Dorado, AR - classroom teacher  
 1974-76 Public School, El Dorado, AR - classroom teacher  
 1984 Dow, Lohnes & Albertson - summer associate attorney  
 1985-93 Dow, Lohnes & Albertson - associate attorney  
 1993 U.S. Department of Commerce - Advisor to the Secretary

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

No military service.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

Kappa Delta Pi - Honorary Education Society	1962
Outstanding Young Women of America	1971, 1972
Outstanding Women of the World	1974
Who's Who in American Politics	1980

9. Bar Associations: List all bar associations, legal or judicial-related committees or conference of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

Arkansas Bar Association  
 District of Columbia Bar Association  
 American Bar Association

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

Lobbying:

Arkansas Bar Association  
 District of Columbia Bar Association  
 American Bar Association

Other:

International Neighbors Club III  
 The Washington Center for Internships and Academic  
 Seminars - Board Member  
 St. Alban's Episcopal Church

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admissions and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Arkansas Supreme Court	1985
Superior Court of the District of Columbia	1985
U.S. District Court for the District of Columbia	1986
U.S. Court of Appeals, District of Columbia Circuit	1987
U.S. Court of Appeals, Eleventh Circuit	1989
United States Supreme Court	1992

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

Attached are copies of the following:

"Ground Water Pollution Control: A National Aim; a Regional Strategy," Pace Environmental Law Review, Vol. 2, 1985;

"New Trademark Reform Act: Rush to File Begins," (co-authored with Arnold P. Lutzker, Esq.), The Alert, Newsletter of the Association of Collegiate Licensing Administrators, Vol 3, No. 2, June 1989;

"Protection of Collegiate Trademarks Under the Trademark Revision Act of 1988," (co-authored with Arnold P. Lutzker, Esq.), Journal of the National Association of College Auxiliary Services, Vol. 13, No. 6, December 1990; and in Business Officer, Newsmagazine of the National Association of College and University Business Officers, Vol 23, No. 11, May 1990.

"Elements of a Licensing Agreement", (co-authored with Arnold P. Lutzker, Esq.), The Community, Technical and Junior College Times, Vol II, No. 13, June 19, 1990.

13. Health: What is the present state of your health? List the date of your last physical examination.

State of health is excellent. Last physical exam in September 1992.

14. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

1971-73 Elected member of Union County (Arkansas) Quorum Court (Justice of the Peace)

1970-74 Appointed Member of Board of Trustees, Southern Arkansas University, a state institution

1975-76 Appointed to Presidential Search Committee for Southern Arkansas University.

15. Legal Career:

- a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;
2. whether you practiced alone, and if so, the addresses and dates;
3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

I have not clerked for a judge nor have I been a sole practitioner. I was a Senior Associate with Dow, Lohnes & Albertson law firm based at 1255 23rd St., N.W., Washington, D.C. 20037, until February 16, 1993. I left that position to accept a Presidential Appointment at the Department of Commerce. In 1984, I was employed as a summer associate with the firm during my last year of law school, and joined the firm as an associate attorney in September, 1985.

- b.
  1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?
  2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

My legal representation, largely for university, educational or religious, non-profit organizations, and media clients, has been principally in the area of trademark matters



at the U.S. Patent and Trademark Office and Trademark Trial and Appeal Board and in the area of copyright matters at the U.S. Copyright Office and in federal court.

- c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.
2. What percentage of these appearances was in:
  - (a) federal courts;
  - (b) state courts of record;
  - (c) other courts.

As Associate Counsel for the plaintiff, I appeared in federal district court on one occasion in connection with a copyright infringement case. I have made no state court appearances. My primary litigation experience has consisted of frequent proceedings before the Trademark Trial and Appeal Board (at the U.S. Patent and Trademark Office) which are conducted almost entirely by written briefs. Oral hearings are rare and are at the discretion of the Board.

3. What percentage of your litigation was:
  - (a) civil;
  - (b) criminal.

100% civil litigation  
0% criminal litigation

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

I have tried no cases to verdict or judgment in courts of record. I was junior associate counsel in a copyright case before the U.S. District Court, Northern District of Georgia that resulted in favorable judgment for my client.

5. What percentage of these trials was:
  - (a) jury;
  - (b) non-jury.

I have tried no cases requiring a jury.

16. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party of parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

- (a) the date of representation;
- (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
- (c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the parties.

Since 1986, the nature of my law practice has been primarily domestic and international registration of trademarks and copyrights; prosecution of trademark applications; plaintiff's and/or defense counsel in trademark opposition and cancellation proceedings; preparation and negotiation of copyright and trademark license agreements; and counselling clients in the intellectual property area. I have been lead counsel for my former law firm in the following three significant litigated cases:

I. University Book Store, Brown's Book Shop, and Wisconsin Merchants Association v. Board of Regents of the University of Wisconsin System, consolidated Opposition Nos. 84,223; 84,224; 84,288; 84,289; 84,290; and 84,789. I represented the University of Wisconsin in a major dispute over the University's ownership and right to control use of its mascot trademark "Bucky Badger" for educational services and on clothing products.

The six cases were filed in 1990 and 1991 at the Trademark Trial and Appeal Board, U.S. Patent and Trademark Office, Washington, D.C. (attention: Helen Wendel, Esquire) and are still pending on cross-motions for summary judgment.

Co-counsel in the case are:

James E. Doyle  
Attorney General  
and;  
Robert W. Larsen  
Assistant Attorney General  
State of Wisconsin  
Department of Justice  
123 W. Washington Avenue  
P.O. Box 7857  
Madison, Wisconsin 53707-7857  
(608) 266-3076

Principal Counsel for the other parties are:

Joseph A. Ranney, Esq.  
Ross & Stevens, S.C.  
One South Pinckney Street  
P.O. Box 2599  
Madison, Wisconsin 53701-2599  
(608) 657-5353

and

Gary D. Krugman, Esq.  
Sughrue, Mion, Zinn, Macpeak & Seas  
2100 Pennsylvania Avenue, N.W.  
Washington, D.C. 20037-3202  
(202) 293-7060

II. On behalf of the Church of Jesus Christ of Latter-day Saints, a religious organization, I have been lead counsel in a dispute with the U.S. Trademark Office over the right to register as a non-generic service mark and trademark: THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS for ministerial and educational services and for certain publications. In re Application of the Corporation of the President of The Church of Jesus Christ of Latter-day Saints, Serial Nos. 74/800567 and 74/206826.

The Church filed application pro se in 1988. My firm became counsel in 1990, and I personally handled the case thereafter. Prior to my departure from the firm in February 1993, I filed Notice of Appeal from the Examiner's refusal to register the mark. Subsequently, the Trademark Trial and Appeal Board remanded the case to the Examining Attorney for reconsideration; the appeal is pending.

Principal trademark counsel for the Trademark Office is:

Robert J. Crowe  
Senior Attorney for Law Office 4  
U.S. Patent and Trademark Office  
Washington, D.C. 20230.  
Telephone (703) 308-9104.

III. As junior associate counsel I represented Georgia Television Company in a copyright infringement action seeking injunction and damages against a video-monitoring company for unauthorized taping and selling of news and public affairs shows produced by the television company: Georgia Television Company v. T.V. News Clips of Atlanta, Inc., 983 F.2d 238 (11th Cir. 1993); 19 USPQ 2d, 1372, (N.D. Ga. 1991); 718 F. Supp. 939 (N.D. Ga. 1989). I was involved in researching and drafting the complaint, and assisting with the briefs through the preliminary injunction, ending in a favorable judgment for my client in 1989 by order of U.S. District Court Judge Jack Camp. The case was subsequently appealed to the U.S. Court of Appeals for the Eleventh Circuit, and at that time, another junior associate colleague assumed the research and drafting responsibilities.



Opposing counsel were:

Anthony B. Askew  
Eugene S. Zimmer  
Jones, Askew & Lunsford  
Suite 2000  
230 Peachtree Street  
Atlanta, Georgia 30303  
(404) 688-7500

L. Ray Patterson  
163 Westview Drive  
Athens, Georgia 30606  
(706) 542-5145

17. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

The nature of my day-to-day legal work has been domestic and international trademark and copyright registration, preparation and negotiation of licensing agreements and contracts, instituting, defending and settling opposition and cancellation cases before the Trademark Trial and Appeal Board, and counselling educational institutions and media companies on decisions involving their intellectual properties. The most significant legal projects I have personally handled are registration in multiple classifications of all trademarks of the University of Arkansas System, the Ohio State University, the University of Cincinnati, George Washington University, Indiana University, and the University of Wisconsin-Madison. In addition, I drafted standard licensing agreements and agency agreements for several of the Universities as well as the College of William and Mary and the Licensing Resource Group, and I advised these clients on enforcement matters and infringement actions. Since many of the University trademarks had been subject to uncontrolled use by third parties for decades, and occasionally had been registered by third parties on both state and federal levels, the registration effort involved significant research, opposition and cancellation proceedings, preparation and negotiation of settlement contracts, and defending and prosecution of the applications with the Trademark Office examining attorneys.

In addition, I managed the trademark practice for the law firm's intellectual property group. This involved supervising junior associates and legal assistants; reviewing and approving legal briefs, filings and correspondence prepared by the associates and legal assistants; supervising and managing

work flow; interviewing and hiring legal assistants; interviewing summer associates; supervision of the docketing system and filing deadlines; instruction of junior associates and legal assistants in substantive trademark and copyright law, Trademark and Copyright Office administrative regulations, and Trademark Trial and Appeal Board legal procedure for ex parte and inter partes litigation. In the last two or three years, my practice was performed principally for clients I brought to the firm and was largely self supervised.

Prior to my legal career, I gained valuable learning and management experience from service as one of the five members of the Board of Trustees of Southern Arkansas University. At the time of my appointment, I was 29 years old and, during the major portion of my term, the only woman on the Board. Acting in a fiduciary capacity, I approved budgets, recommended and approved significant policy initiatives concerning educational issues and racial integration, and studied proposals and approved construction of a library and nursing school. Following a four year term, I was asked to serve on the Search Committee for a President of the University.

In 1971, I served two years as an elected member of the Union County (Arkansas) Quorum Court, the County governing body. This responsibility required approval of budgets for the County Courthouse operations, jail and youth home, among other matters.

## II. FINANCIAL DATA AND CONFLICT OF INTEREST

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

I resigned as an associate attorney from Dow, Lohnes & Albertson on February 16, 1993. Subsequently, other than my last salary check, I received no remuneration of any kind from that business association or from any former client, and I expect none.

Currently, I am a participant in a 401 K Retirement Plan for Dow, Lohnes & Albertson associate attorneys. The plan has been fully funded by the Associate Attorneys, with no participation by the partners, since October 1987 when I became a participant. I will divest the Plan and roll it over into my IRA, if and when I am confirmed.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflict-of-interest during your initial service in the position to which you have been nominated? If so, explain.

I will seek and follow the advice of the appropriate Department of Justice ethics official before participating in any matter that could affect my financial interests.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service in the position to which you have been nominated? If so, explain.

I have no plans, commitments, or agreements to pursue outside employment during my service as Assistant Attorney General.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be submitted here.)



See attached Financial Disclosure report required by the Ethics in Government Act of 1978.

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).

See attached financial net worth statement.

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

1966 and 1972 Fulbright for Senate - Union County (Arkansas) Coordinator.

1969 Beryl Anthony for Prosecuting Attorney, 13th Judicial District (Arkansas), Manager and Surrogate.

1969 Dale Bumpers for Governor (Arkansas) - Fund raising event sponsor.

1978-92 Beryl Anthony for Congress - Manager and Surrogate.

1980 Elected delegate, Democratic National Convention.

1991-1992 Clinton for President - Member of Washington, D.C. Steering Committee, fundraiser.

## III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in service the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

I have been a member of the D.C. Legal Aid Society and in charge of fundraising from associates in my firm for contribution to the legal costs for indigent people seeking advice on a variety of legal matters.

Additionally, for the last four years, I have been co-chair (with Harriet Pressler) of the annual fund-raising dinner for the Washington Center for Internships and Academic Seminars, and I was asked to serve on the Board of Trustees this year. The organization places and supervises college students, many disadvantaged and on scholarships, as interns in Congressional Offices, in Executive Departments and in other public and private organizations. The Washington Center arranges and conducts seminars and requires its students to write reports on matters of public interest. These interns receive college credit for their "Washington semester," and are encouraged to enter public service.

Other organizations to which I have contributed my pro bono and volunteer time are:

The Washington Ballet -- helped with trademark dispute and a copyright matter;  
 Bozeman Park School for Exceptional Children -- contributed one year of speech therapy to mentally handicapped children;  
 American Red Cross, National Capital Chapter -- served one year on International Committee;  
 Panel of American Women, State Co-Chair -- assisted public schools with racially sensitive problems;  
 Murphy-Beachamp Youth Home, Board Member -- housing for abandoned children or children removed from their parents.

In addition to my career as a lawyer, teacher, parent, elected official, and involved citizen, I have had an indirect responsibility for public service for 14 years as the spouse of a former member of the U.S. House of Representatives. From this vantage point, I have become acutely aware of the need for good relations between the legislative and administrative bodies on both the federal and state levels. Those bodies

bear equal responsibility for good government, and I intend to do my part to facilitate accurate and timely responses from the decision-makers at the Department of Justice to the U.S. Congress.

2. Do you currently belong, or have you belonged, to any organization which discriminates on the basis of race, sex, or religion -- through either formal membership requirements or the practical implementation of membership policies?

I do not belong to any discriminatory organization. During my college years, from 1958-62, I joined a national women's sorority, Chi Omega. I have not been a member of the sorority for 30 years.



## FINANCIAL STATEMENT

## NET WORTH

Joint for Sheila and Beryl Anthony

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS			LIABILITIES		
Cash on hand and in banks—Schedule A	121	000 00	Notes payable to banks—secured	112	500 00
U.S. Government securities—add schedule			Notes payable to banks—unsecured	112	500 00
Schedule C	1	600 00	Notes payable to relatives		
Listed securities—add schedule			Notes payable to others		
Unlisted securities—add schedule D	675	000 00	Accounts and bills due		
Accounts and notes receivable:			Unpaid income tax		
Due from relatives and friends *			Other unpaid tax and interest		
Due from others			Real estate mortgages payable—add schedule	200	000 00
Doubtful			Schedule E		
Real estate owned—add schedule B	455	000 00	Chattel mortgages and other liens payable		
Real estate mortgages receivable			Other debts—itemize:		
Autos and other personal property	64	000 00			
Cash value—life insurance	5	000 00			
Other assets—itemize:					
IRA—Nat'l Bank of Commerce	17	000 00			
IRA—Merrill-Lynch **	14	000 00			
Federal Retirement Account	40	000 00	Total liabilities	425	000 00
401K at Dow, Lohnes	56	000 00	Net worth	1,023	600 00
Total assets	1,448	600 00	Total liabilities and net worth	1,448	600 00
CONTINGENT LIABILITIES			GENERAL INFORMATION		
As endorser, cosigner or guarantor	None		Are any assets pledged? (Add schedule.)	No	
On leases or contracts	None		Are you defendant in any suits or legal actions?	No	
Legal Claims	None		Have you ever taken bankruptcy?	No	
Provision for Federal Income Tax	None				
Other special debt	None				

\*I am a potential beneficiary of a one-third contingency interest in the Vincent Foster, Sr., Insurance Trust and the Alice Mae Foster Trust. I currently have no control over the management of the assets of either trust.

\*\*The Merrill-Lynch IRA includes the following stock: Tysons Foods, Inc., and Black Hills Corp.

Schedule A - Cash

Crestar Joint Checking and Savings Account	\$76,000.00
First National Bank, Hope, Arkansas	10,000.00
Merrill-Lynch Cash Management Account	30,000.00
Department of Justice Credit Union	<u>5,000.00</u>
	\$121,000.00

Schedule B - Real Estate

3900 Macomb Street, N.W.	
Washington, D.C.	(approx) \$450,000.00
1/3 interest in undeveloped land in	
Hope, Arkansas	(approx) 5,000.00

Schedule C - Listed Securities

Sprint	\$1,600.00
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Schedule D - Unlisted Securities

Anthony Forest Products, Co.	\$450,000.00
Porterco, Inc.	225,000.00

Schedule E - Real Estate Mortgage

National Bank of Commerce, ElDorado, Arkansas	\$200,000.00
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SUBMISSION OF FRANK W. HUNGER  
TO  
THE UNITED STATES SENATE COMMITTEE  
ON THE JUDICIARY

1. BIOGRAPHICAL INFORMATION (PUBLIC

1. Full name (include any former names used.)

Frank Watson Hunger

2. Address: List current place of residence and office address(es).

Home: 1211 Kirk Circle  
Greenville, Mississippi 38701

Office: Lake, Tindall, Hunger & Thackston  
127 South Poplar  
Greenville, Mississippi 38701

3. Date and place of birth.

July 22, 1936, Winona, Mississippi

4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

Widowed - July 11, 1984.

Spouse's Name: Nancy Gore Hunger, deceased.

No children.

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

University of Mississippi, Oxford, Mississippi, 1954-1958, B.B.A. Degree (1958)

University of Mississippi School of Law, Oxford, Mississippi, 1962-1963

Duke University School of Law, Durham, North Carolina, 1963-1965, L.L.B. (1965)

6. Employment Record: List (by years) all businesses or professional corporations, companies, firms or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor or employee since graduation from college.



September 1958 - May 1962 - United States Air Force. Stationed in Wichita Falls, Texas (September 1958 - January 1959); Tainan, Taiwan (February 1959 - May 1960); Washington, D.C. (May 1960 - May 1962).

June 1964 - September 1964 - Law Clerk, Honorable J.P. Coleman, deceased, Ackerman, Mississippi.

August 1965 - July 1966 - Law Clerk, Honorable J.P. Coleman, deceased, United States Court of Appeals for the Fifth Circuit, New Orleans, Louisiana and Ackerman, Mississippi.

July 1966 - to date - partner - currently senior/managing partner of Lake, Tindall, Hunger & Thackston, Greenville, Mississippi.

1978 - 1990 - Director, Stein Mart, Inc. (department store chain), Greenville, Mississippi and Jacksonville, Florida.

1982 - to date - Director, Bank of Winona, Winona, Mississippi.

1974 - to date - Director, 127 Poplar, Inc., Greenville, Mississippi (corporation owning land and building from which law practice is conducted).

1972 - to date - Director and Officer, Transact, Inc., 127 South Poplar, Greenville, Mississippi (lease airplane).

May 5, 1993 - to date - unpaid consultant, United States Department of Justice, Washington, D.C.

Served as a Director of the Greenville, Mississippi Chamber of Commerce during the late 1970's.

Chairman of the Greenville Industrial Foundation 1981.

Director and Chairman of the Board of William Alexander Percy Memorial Library 1967-1974.

Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

Officer, United States Air Force, September 1958 - May 1962 (discharged as a 1st Lt.) Stationed in Wichita Falls, Texas; Tainan, Taiwan and Washington, D.C. Serial No. A03085582. Honorable discharge - May 1962.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees and honorary society memberships that you believe would be of interest to the Committee.

Fellow - American College of Trial Lawyers - State Committee.

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

Director (1983 to date), Vice President (1991-1993) and President Elect (1993-1994) of the Bar Association of the Fifth Federal Circuit (4,000 member association composed primarily of lawyers practicing in the Federal Courts of Texas, Louisiana and Mississippi)

Member (1980-1984) and Chairman (1983) Mississippi Judicial Selection Committee

Charter Member - Commission for Continuing Legal Education for the State of Mississippi (1985)

Committee to write and implement local Uniform Rules for Civil Practice for the Northern and Southern Districts, United States District Court of the State of Mississippi (1984)

United States Fifth Circuit Judicial Conference (1984 to date)

Member of the Washington County, Mississippi and American Bar Associations - 1966 to date; past Vice-President and President of the Washington County Bar Associations.

Member of the American College of Trial Lawyers, International Association of Insurance Counsel, American Judicature Society, Federal Bar Association and Mississippi Defense Lawyers Association.

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

Lobbying: Bar Associations and AOPA - Aircraft Owners & Pilots Association

Other: Greenville Chamber of Commerce  
Cypress Hills Tennis Club, Inc.

11. Court Admission: List all courts in which you have been

admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Mississippi (1966); United States District Courts for the Northern and Southern Districts of Mississippi (1966); United States Court of Appeals for the Fifth Circuit (1966); United States District Court for the Western District of Arkansas (1989).

12. Published Writings: List the titles, publishers and dates of books, articles, reports or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

None.

13. Health: What is the present state of your health? List the date of your last physical examination.

Excellent. January of 1992.

14. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

None.

15. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court and the dates of the period you were a clerk;
2. whether you practiced alone, and if so, the addresses and dates;
3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;



- b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?
2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

I attended law school at the University of Mississippi from June 1962 to May 1963, transferring to Duke University School of Law in September 1963. I graduated from Duke University School of Law in May 1965. After graduation from law school, I served as law clerk to the Honorable J.P. Coleman, United States Court of Appeals for the Fifth Circuit from August 1965 to July 1966. I joined the law firm of Lake, Tindall, Davidson & McGee in Greenville, Mississippi in July of 1966. From 1967 to the present, I have been a partner in the law firm, presently known as Lake, Tindall, Hunger & Thackston. I currently serve as the managing partner of the firm and specialize in civil litigation and trial practice. Although the firm's main office is located in Greenville, Mississippi, my practice has extended throughout the United States. I have never been a sole practitioner.

In the early stages of my career, I handled a wide variety of civil cases ranging from automobile and airplane accidents to premises liability actions. During those years, I gained trial experience in the municipal, county and state courts in and near the Greenville, Mississippi area. As I gained experience, the nature of the cases in which I was involved became far more complex. During the recent past, I have litigated a broad spectrum of cases ranging from toxic tort and products liability actions to contract actions in both state and federal courts.

I have also handled at both the trial and appellate level criminal cases serving as court appointed counsel on matters ranging from simple assaults to capital murder.

I have been instrumental in directing the growth of the law firm from a three-lawyer firm with a local practice to an organization of seventeen lawyers with offices in two states. The firm's clients now range from local merchants to Fortune 500 companies. For the past few years, I have served as managing partner of the firm and

have been in charge of employment and personnel matters, litigation assignment and management, and the law firm's finances.

I would characterize my specialization as civil litigation and have handled in the hundreds of civil cases.

A representative client list for the last several years would include American Honda Motor, Co., Inc., Chevron, U.S.A. Shell Oil Company, Mutual Insurance Company of New York, Allstate Insurance Company, Ashland Chemical Company, CIGNA, Ford Motor Credit, Stein Mart, Inc., Shelter Insurance Company, John Deere, and approximately 15 separate municipalities or cities located in the State of Mississippi. I am also currently representing individuals in civil litigation that covers a broad spectrum of matters.

- c. 1. Did you appear in court frequently, occasionally or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.
2. What percentage of these appearances was in:
  - (a) federal courts;
  - (b) state courts of record;
  - (c) other courts.
3. What percentage of your litigation was:
  - (a) civil;
  - (b) criminal.
4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel or associate counsel.
5. What percentage of these trials was:
  - (a) jury;
  - (b) non-jury.
6. Throughout my legal career, I have appeared frequently in state and federal courts in both jury and non-jury trials. During the most recent stages of my career, however, because of the increased complexity and magnitude of the cases for which I have been responsible, my court appearances have been less frequent.

I would estimate that 40% of my litigation experience has been in federal courts and approximately 60% in state courts. The overwhelming majority, 95% or better, of the cases I have handled have been civil in nature. I would estimate that I have tried to judgment or verdict approximately 150 cases, roughly 60% of which were jury trials. In the overwhelming majority of these cases, I acted as chief counsel or sole counsel.

16. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

- (a) The date of representation;
- (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
- (c) the individual name, addresses and telephone numbers of co-counsel and of principle counsel for each of the parties.

1. Little v. Liquid Air Corporation, Chevron and Victor Manufacturing Company, Cause No. 90-1808 - United States Court of Appeals for the Fifth Circuit. (939 F.2d 1293 and 952 F.2d 841) (1992) (Case currently pending en banc)

I represent Chevron as chief counsel in this complex products liability case involving, among other things, the appropriateness of summary judgement in negligence and products liability actions. Other significant issues deal with the "learned intermediary," "sophisticated user" and "bulk seller doctrine" in products liability cases. It is noteworthy that on rehearing the first opinion in the case (939 F.2d 1293) was changed and superseded by a second opinion at 952 F.2d 841 (1992). After the second opinion, the Court on its own motion reconsidered the matter and put the case en banc for consideration by the entire court. I argued the case to the en banc court in June 1992, and as of this date, it is still undecided. The case was litigated before the Honorable Neal B. Biggers, U.S. District Judge, Northern District of Mississippi, and appealed to the United States Court of Appeals for the Fifth Circuit.



John L. Low, IV, Watkins & Eager, Jackson, Mississippi, 601/948-6470, for Liquid Air.

W. Swan Yerger, Heidelberg, Woodliff & Franks, Jackson, Mississippi, 601/948-3800, for Victor Manufacturing.

Michael T. Lewis, Lewis & Lewis, Clarksdale, Mississippi, 601/627-4477, for Little and Carter.

2. Eskrigge, Individually and as a Proposed Class Representative of Cable Television Customers Residing in Grenada, Mississippi, et al v. City of Grenada and Its Elected Officials, No. WC90-30-B-G, United States District Court, Northern District of Mississippi, Western Division. (1990)

I acted as chief counsel for the City of Grenada, Mississippi and its elected officials in defense of a lawsuit brought under the Cable Communications Policy Act of 1984 for alleged breach of contract and violation of state and federal laws pertaining to cable companies. The City, through its elected officials, granted a franchise to a competing cable company and in an effort to thwart the City's actions, the company in place (Grenada Video) sought an injunction and monetary damages from the City and its officials. After a few months of litigation and before trial, the case was successfully concluded when the plaintiffs dismissed their lawsuit.

Honorable Neal B. Biggers, United States District Judge, Oxford, Mississippi.

Larry D. Moffett, Daniel, Coker, Horton & Bell, Jackson, Mississippi, (601/969-7606) for plaintiff.

Stephen L. Thomas, Lake, Tindall, Hunger & Thackston, Greenville, Mississippi, 601/378-2121, associate counsel for defendants.

3. Thomas G. Wilson v. Big River Broadcasting Corp., No. PB-C-88-225, United States District Court for the Eastern District of Arkansas (1989).

I was chief counsel for Big River Broadcasting in this libel, slander and defamation action brought against Big River in the United States District Court for the Eastern District of Arkansas. The suit grew out of a series of television broadcasts exposing alleged fraud and misdeeds in a county-owned hospital. Compensatory and punitive damages were sought. After a

week's trial in Little Rock, the case was submitted to the jury on both compensatory and punitive damages. The jury returned a verdict for the defendant.

Honorable ElsiJane T. Roy, United States District Judge, Little Rock, Arkansas, presiding judge.

Charles S. Gibson, Gibson & Dean, Dermott, Arkansas, 501/538-3288 for plaintiff.

Spencer F. Robinson, Ramsey, Cox, Bridgforth, et al, Pine Bluff, Arkansas, 501/535-9000, associate counsel for defendant.

4. Lonnie Lightsey, et al v. Shell Oil Company and Ashland Chemical Company, No. GC 86-114-LS-0 United States District Court, Northern District of Mississippi (1988).

As chief counsel, I successfully defended Shell Oil and Ashland Chemical in this complex toxic tort, products liability, negligence action that was litigated over a period of three years. The major challenge was to present to the jury in an understandable way a highly complex case involving numerous technical issues. Over 25 experts testified on issues involving petroleum refining, chemical composition, toxic exposure and the response of the nervous system to various products.

Honorable L.T. Senter, United States District Judge, Aberdeen, Mississippi.

Benjamin E. Griffith and Albert B. Smith, Cleveland, Mississippi, 601/843-6100, for plaintiffs.

Stephen L. Thomas, Lake, Tindall, Hunger & Thackston, Greenville, Mississippi, 601/378-2121, associate counsel for defendants.

5. United States Bank v. Thompson McKinnon Securities, Inc., No. DC 82-179-LSO, United States District Court, Northern District of Mississippi, Delta Division (1982)

I represented Thompson McKinnon Securities, Inc. as chief counsel in this case where they were charged with negligence and possible fraud for allegedly failing to deliver securities which the bank claimed it had ordered. Contract and security questions evolving around a broker's and bank's obligations when trading securities were involved. After several months of pre-

trial litigation, the case was concluded via way of settlement.

Honorable L.T. Senter, United States District Judge, Aberdeen, Mississippi.

Jack F. Dunbar and Jane W. Wilborne, Holcomb, Dunbar, Connell, et al, Clarksdale, Mississippi, 601/627-2241, for plaintiff.

6. FMC Finance Corp. v. F.W. Reed, 592 F.2d 238 (5th Cir. 1979).

This is a contract case where I acted as chief counsel for FMC Finance in an effort to recover principal and interest on notes financing the debtor's purchase of equipment. Through a third-party complaint, the debtor sought to justify his non-payment of the notes by creating another contract. Issues involving "conflicts of law," "ratification," promissory estoppel and the "statute of frauds" were involved in the case. The jury returned a special verdict for FMC, and the judgment was appealed to the United States Court of Appeals for the Fifth Circuit which affirmed the trial court's decision.

Honorable Omar R. Smith, Jr., deceased, United States District Judge.

H.L. Merideth, Jr., Greenville, Mississippi, 601/378-5960, for defendant/appellant F.W. Reed.

7. Delta & Pine Land Co. v. Peoples Gin Company, et al, 546 F.Supp. 939 (Northern District of Mississippi 1982), affirmed 694 F.2d 1012 (5th Cir. 1983).

As chief counsel, I represented Hollandale Seed & Delinting Company, Inc. in this matter, which is now recognized as the sentinel case interpreting the Plant Variety Protection Act §§1, et. seq. 113, 7 U.S.C.A., §2321, et. seq. 2453. Issues concerning Congressional intent and permissible exemption under the statute were at issue. Although I did not prevail on the point I urged, the Court recognized the validity of the position and for the first time clarified what it perceived to be Congressional intent on an important aspect of the law.

Honorable William C. Keady, Jr., deceased, United States District Judge, Greenville, Mississippi, trial judge.



Nathan P. Adams, Greenville, Mississippi, 601/334-2685, for Peoples Gin.

Don Bourland, Rickey, Bourland & Helfin, et al, Memphis, Tennessee, 901/683-3526, for Delta & Pine Land.

8. Yellow Bayou Plantation, Inc. v. Shell Chemical, Inc., 491 F.2d 1239 (5th Cir. 1974).

I acted as chief counsel for Shell in successfully defending it on charges on misrepresentation, breach of warranties, negligence and intentional misconduct. The case is frequently cited for the proposition that failure to follow a manufacturer's instructions provides a good defense in a products case.

Honorable William C. Keady, deceased, United States District Judge, Greenville, Mississippi, trial judge.

Philip Mansour, Mansour & Mansour, Greenville, Mississippi, 601/378-2244, for plaintiff/appellant, Yellow Bayou Plantation.

9. D&W Jones, Inc. v. Collier, 372 So.2d 288 (Miss. 1979).

I was chief counsel for Valley Flying Service, Inc. against which damages were sought as a result of aerial application. Legal issues concerning proximate cause, joint and several liability and apportionment of fault were involved on appeal. At the trial level, the case had issues concerning a landowner's right to treat his crops at whatever time he chose, the effect of chemicals on fish, and the question of computing damages when the product allegedly destroyed (a crop of fish) could not be seen or counted.

Honorable B.B. Wilkes, Circuit Judge, Greenville, Mississippi, trial judge.

H.L. Merideth, Jr., Greenville, Mississippi, 601/378-5960, for D&W Jones.

Stephen L. Thomas, Greenville, Mississippi, 601-378-2121, for Hampton Collier.

Ray D. Campbell, Jr., Greenville, Mississippi, 601/335-6011, for Jimmy Hollingsworth.

Michael Allred, Satterfield, Allred, et al,

Jackson, Mississippi, 601/948-2086, co-counsel for Valley Flying.

10. H.B. Hood v. Christmas Flying Service, et al, No. 7594, Circuit Court of Bolivar County, Mississippi (1983).

I was chief counsel for Christmas Flying Service in this tort action. The case was noteworthy in that the plaintiff claimed severe damage to his 1,000-acre cotton crop and sought to substantiate his damages by providing yield figures coupled with expert testimony. To combat the effort, I reconstructed the plaintiff's production in several earlier years and, using this with experts, convinced the jury that the plaintiff had no loss in the year in question as a result of any action by my client. After trial, the jury returned a verdict for the defendant.

Honorable John Pearson, Circuit Judge, Bolivar County, Mississippi, trial judge.

Tommie Williams, Upshaw, Williams, etc., Greenwood, Mississippi, 601/455-1613, for defendant M.A. Bell.

Jack F. Dunbar and Edward H. Moss, Holcomb, Dunbar, Connell, et al, Clarksdale, Mississippi, 601/627-2241, for plaintiffs.

17. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived).

Over the years, my practice for the most part has been devoted to civil litigation and covered a broad spectrum of cases. In addition to the cases listed above, I have litigated cases dealing with construction contracts, pharmaceuticals, retirement benefits, employment contracts, health care, admiralty, patents, aviation, insurance contracts, communication issues and malpractice (legal, accounting, architectural, medical and engineering). I currently, or in the recent past, have represented over 15 separate municipalities or their officials as special counsel in litigated cases. Among other things, these suits deal with sovereign immunity, agency, municipal contracts and tort liability.

I presently represent a major manufacturer and distributor of vehicles and handle a significant volume of complex litigation for them. In the recent past and for a number of years, I served as chief counsel for a department store chain that expanded from a one-store operation to a national chain that does business throughout the United States.

I have also been active on a pro bono basis on numerous matters. I have represented and counselled pro bono clients on matters ranging from rent disputes and financial contracts to domestic problems. Throughout my legal career, I have worked closely with the judiciary to promote a better relationship between the bench and bar. I participated in the writing of the Uniform Rules of Civil Procedure for the Northern District of Mississippi. These rules presently govern local civil procedures before the United States District Courts in Mississippi. I have also been active in promoting and encouraging continuing legal education. I was a charter member of the State of Mississippi C.L.E. Committee and have spoken at several C.L.E. seminars.

In summary, I have had a broad range of legal experience with an emphasis on civil litigation.



## II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

I intend to disassociate myself from all business and income producing professional relationships with which I have been involved prior to my nomination. After disassociation from my law firm, my equity interest in the firm will be evaluated, and thereafter paid to me in monthly payments over a period of two to four years. In addition to this, in an effort to lessen what could be a financial burden on my former partners, I intend to leave a cash balance with them for their use as working capital. I will be given a note for this sum and it will be properly collateralized. During the period of time which the firm owes me money, I will in no way participate in any of its business matters, nor will I participate in any matter it may have with the United States Government. Our relationship will strictly be a debtor/creditor one. I have discussed this situation with the Ethics Office of the United States Department of Justice and have been informed that it is acceptable and in accordance with appropriate legal and ethical guidelines.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

I have conferred with the Ethics officials of the Department of Justice to assure that all potential conflicts of interest are promptly resolved. Throughout my service with the Department, I will recuse myself from any matter involving my former law firm or any former client from which I derived significant business. I will strictly follow 18 U.S. C. §208 with respect to any matter in which I have a financial interest.

3. Do you have any plans, commitments or agreements to pursue outside employment, with or without compensation, during your service in the position to which you have nominated? Is so, explain.

No. I am the President-Elect of the Bar Association for the Fifth Circuit and would like to continue with this endeavor. It is a non-paying public service job.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria and other items exceeding \$500.00 or more. (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

See attached SF 278.

5. Please complete the attached financial net worth statement in detail. (Add schedules as called for.)

See attached.

6. Have you ever held a position or played a role in a political campaign? if so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

Yes.

(a) I took a leave of absence from my law firm during the past Presidential campaign and without title or pay acted as an advisor to the Clinton/Gore Campaign travelling with the Vice President. In addition to contributing to the campaign, I also raised money for the Clinton/Gore ticket.

(b) I participated in the 1988 campaign of Senator Albert Gore, Jr. to become the nominee for President for the Democratic Party. I acted as a fund raiser and adviser without title or compensation.

(c) I have actively participated in every Senatorial and Congressional campaign that has been waged by Senator/Congressman Albert Gore, Jr. On each occasion, I acted as an adviser and fund raiser without title or pay.

(d) I acted as a fund raiser for former Congressman Mike Espy in each of his campaigns for the United States Congress.

(e) I have served on campaign committees and/or as a fund raiser for numerous Democratic candidates for Governor (Ray Mabus, William Winter, William Waller and James P. Coleman), Lt. Gov. (Brad Dye), Attorney General (Mike Moore and Niles McNeel), Secretary of State (Richard Molpus),

Treasurer (Brad Dye), Auditor (Ray Mabus) and Supreme Court Justices (Frank Barbour, Rubin Anderson, James Robertson and Fred Banks) in the State of Mississippi. On no occasion did I have an official title or receive any compensation.



### III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

I have never refused to help a person in need of legal assistance as a result of his or her financial condition. Sometimes I have handled the matter myself, on others obtained the assistance of an associate or other partner, and on still others referred the individual to legal services. Over the years I have accepted court appointments for indigents and represented them at little or no charge on matters ranging from capital murder (State of Mississippi v. Harold Charles) to possession of a weapon (U.S. v. King). I believe in public service and have served on a pro bono basis as an adviser to numerous charitable organizations (YMCA, Salvation Army and Community Fund). Over the years, I have devoted hundreds of hours to promoting justice for all regardless of race, creed, color or financial condition through activities with the local, state and federal bar associations. My law firm has a policy of participating in pro bono programs, and at all times, we have three or more lawyers who are agreeable to working on such matters.

2. Do you currently belong, or have you belonged, to any organization which discriminates on the basis of race, sex, or religion -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?

No. As a child I was raised in a society where the law institutionalized racial segregation. Since becoming an adult I have never knowingly been a member of an organization that discriminated on the basis of race, creed, color, or gender.

ASSETS			LIABILITIES		
Cash on hand and in banks	\$716,	00 00	Notes payable to banks—secured		
U.S. Government securities—add schedule	\$640,	00 00	Notes payable to banks—unsecured		
Listed securities—add schedule	\$1,029,	00 00	Notes payable to relatives		
Unlisted securities—add schedule	\$1,012	00 00	Notes payable to others		
Accounts and notes receivable:			Accounts and bills due		
Due from relatives and friends	-		Unpaid income tax		
Due from others	-		Other unpaid tax and interest		
Doubtful	-		Real estate mortgages payable—add schedule		
Real estate owned—add schedule	\$155,	00 00	Chattel mortgages and other liens payable		
Real estate mortgages receivable			Other debts—itemize:		
Autos and other personal property	\$275,	00 00			
Cash value—life insurance	\$5,	00 00			
Other assets—itemize:					
LITH&T Equity Ownership	\$100,	00 00			
IRA (Merrill Lynch)	\$22,	00 00			
			Total liabilities	NONE	
			Net worth	\$3,954	000 00
			Total liabilities and net worth	\$3,954	000 00
Total assets	\$3,954,	000 00			
CONTINGENT LIABILITIES			GENERAL INFORMATION		
As endorser, cosigner or guarantor	None		Are any assets pledged? (Add schedule.)	NO	
On leases or contracts	None		Are you defendant in any suits or legal actions?	NO	
Legal Claims	None		Have you ever taken bankruptcy?	NO	
Provision for Federal Income Tax	None				
Other special debt	None				

U.S. Government Securities:

\$105,000.00 - Bills due 10/21/93 (KEOGH)  
 \$200,000.00 - Bills due 4/30/94 (KEOGH)  
 \$100,000.00 - Bonds due 6/30/94  
 \$101,000.00 - Bonds due 2/15/96  
 \$9,000.00 - Series E Bonds  
 \$25,000.00 - U.S. Treasury (Stripped Interest) 11/15/09  
 \$100,000.00 - U.S. Government Money Market Fund

Listed Securities:Common Stock and Mutual Funds:

American Telephone & Telegraph  
 Asarco, Inc.  
 Atlantic Richfield Corporation  
 Bethlehem Steel Corporation  
 Bristol Myers Squibb Corporation  
 Cummings Engine  
 Dominion Resources  
 Exxon U.S.A.  
 Ford Motor Company  
 General Motors (\$5.00 preferred) (Keogh Plan)  
 W.R. Grace  
 Hercules, Inc.  
 IBM  
 Ely Lily  
 Occidental Petroleum Corp.  
 Olin Corporation  
 Pfizer, Inc.



Reynolds Metals  
 Sears (Keogh Plan)  
 Stein Mart, Inc.  
 Sara Lee Corporation  
 Texaco, Inc.  
 U.S.G.  
 Unisys Corp.  
 Space Labs Medical  
 Advance Technological Laboratories  
 Bell Atlantic  
 U.S. West  
 Bell South  
 Southwestern Bell  
 Ameritech  
 Pacific Telesis  
 A.P. Green  
 Sunburst Bank  
 Bank of Winona  
 Southmark, Inc.  
 Windsor Funds "Vanguard Group" (Keogh Plan)

Corporate Bonds:

AT&T Bonds due 2/15/96 (KEOGH Plan)  
 ALCOA Bonds due 2/15/93 (KEOGH Plan)  
 U.S.G. Bonds

Unlisted SecuritiesCommon Stock:

Bank of Winona

Southwide, Inc.

Carlyle Real Estate

127 Poplar, Inc.

Bonds:

Mississippi Muni Bonds (state and various municipalities)

State and Muni Bonds other than Mississippi - (Louisiana; Massachusetts; New Orleans; Hanover, New Hampshire; Travis County, Texas; Shelby County, Tennessee)

Real Estate Owned:

1211 Kirk Circle, Greenville, Mississippi

Lot in Iuka, Mississippi

Autos and other persons property (furnishings, airplane and automobiles)



United States  
**Office of Government Ethics**  
1201 New York Avenue, NW., Suite 500  
Washington, DC 20005-3917

MAY 11 1993

The Honorable Joseph R. Biden  
Chairman  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510-6275

Dear Mr. Chairman:

In accordance with the Ethics in Government Act of 1978, I enclose a copy of the financial disclosure report filed by Frank W. Hunger, who has been nominated by President Clinton for the position of Assistant Attorney General for the Civil Division, Department of Justice.

We have reviewed the report and have also obtained advice from the Department of Justice concerning any possible conflict in light of its functions and the nominee's proposed duties. Also enclosed is a letter from the ethics official of the agency dated May 11, 1993, which discusses counseling provided to Mr. Hunger regarding matters affecting his financial interests generally and his law firm specifically.

Based thereon, we believe that Mr. Hunger is in compliance with applicable laws and regulations governing conflicts of interest.

Sincerely,

A handwritten signature in dark ink, appearing to read "Stephen D. Potts".

Stephen D. Potts  
Director

Enclosures

bcc: Department of Justice



## Executive Branch PUBLIC FINANCIAL DISCLOSURE REPORT

SF 276 (Rev. 1-63)  
U.S. Office of Government Ethics

Calendar Year Covered by Report 1992		Date of Appointment, Confirmation, Reappointment, or Reappointment (Month, Day, Year) 1/1/92		Termination Date (If Applicable) (Month, Day, Year) None		Agency Use Only	
Reporting Status <input type="checkbox"/> Incumbent <input checked="" type="checkbox"/> New Entrant, Nominee, or Candidate		First Name and Middle Initial Frank W.		OGE Use Only MAY - 5 1993			
Reporting Individual's Name Hunger		Title of Position Assistant Attorney General		Department or Agency (If Applicable) U.S. Department of Justice		Fee for Late Filing Any individual who is required to file this report and does so more than 30 days after the date the report is required to be filed, or, if an extension is granted, more than 30 days after the last day of the filing period, shall be subject to a \$200 fee.	
Position for Which Filing Location of Present Office 127 S. Poplar, Greenville, MS 38701		Telephone No. (Include Area Code) 601/378-2121					
Position(s) Held with the Federal Government During Last 18 Months (If Not Same as Above) None		Title of Position(s) and Detail(s) Held Senate Judiciary				Reporting Periods Incumbents: The reporting period is the preceding calendar year up to and including the date of filing. For new entrants, nominees, and candidates, the reporting period is the calendar year up to the date of filing. Part II of Schedule D is not applicable.	
Presidential Nominee Subject to Senate Confirmation None		Do You Intend to Create a Qualified Dismissal Trust? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No				Termination Filing: The reporting period begins at the end of the period covered by your previous filing and ends at the date of termination. Part II of Schedule D is not applicable.	
Certification (Signature of Reporting Individual) Frank W. Hunger		Date (Month, Day, Year) 2/23/93				Nominees, New Entrants and Candidates for President and Vice President: Schedule A: The reporting period for income (BLOCK C) is the preceding calendar year and the current calendar year up to the date of filing. Value assets as of any date you choose that is within 31 days of the date of filing.	
Other Review (If Desired by Agency) Signature of Designated Agency Ethics Official (If Reporting Official) Stephen L. Colyer		Date (Month, Day, Year) 5/4/93				Schedule B: Not applicable.	
Agency Ethics Official's Opinion The information contained in this report discloses no conflict of interest under applicable laws and regulations.		Signature of Designated Agency Ethics Official (If Reporting Official) Stephen L. Colyer		Date (Month, Day, Year) 5/11/93		Schedule C: Part I (Liabilities)-The reporting period is the preceding calendar year and the current calendar year up to any date you choose that is within 31 days of the date of filing.	
Office of Government Ethics Use Only \$0						Schedule C: Part II (Agreements or Arrangements)-Show any agreements or arrangements as of the date of filing.	
Comments of Reporting Official (If additional space is required, use the reverse side of this sheet) Annotations for Mr. Hunger - 3/12 - may submit - see, eno. 000						Schedule D: The reporting period is the preceding calendar year up to the date of filing.	

Attest: G.S. Smith (GSE), per information from Mr. Bixenbach (GSE) ☐ reverse side

SF 778 (Rev. 1/81)

U.S. Office of Government Ethics

Reporting Individual's Name

Frank W. Hunger

## SCHEDULE A

Page Number

1

Income: type and amount. If "None (or less than \$201)" is checked, no other entry is needed in Block C for that item.

## BLOCK B

Valuation of Assets at close of reporting period

## BLOCK A

Assets and Income

Identify each asset held for the production of income which had a fair market value exceeding \$1,000 at the close of the reporting period.

Identify each asset or source of income which generated over \$200 in income during the reporting period.

None ☐

Control Airline Common

East Jones &amp; Smith, Houston, USA

Kangaroo Equity Fund

East Jones &amp; Smith pension plan

None

None

None

None

None

None

None

None

None

None

None

None

None

None

None

None

None

None

None

None

None

None

None

None

None

None

None

None

None

None

None

None

None

None

Ameritec Common

ASARCO Common

AT&amp;T Common

Atlantic Richfield Common

Bank of Winona Common

Bell Atlantic Common

## BLOCK C

## Type

## Amount

Actual Amount

Only if "Other" specified

Date (Mo., Day, Yr.)

Only if Honoraria

Date (Mo., Day, Yr.)

Only if Honoraria

Date (Mo., Day, Yr.)

Only if Honoraria

Date (Mo., Day, Yr.)

Only if Honoraria

Date (Mo., Day, Yr.)

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Date (Mo., Day, Yr.)

Only if Honoraria

Date (Mo., Day, Yr.)

Only if Honoraria

## SCHEDULE A

Page Number 2

[illegible]



Frank W. Hunger

Page Number  
3

**Income:** type and amount. If "None (or less than \$201)" is checked, no other entry is needed in Block C for that item.

[illegible]









47720 (Rev. 1-60)  
 U.S. Office of Government Ethics  
 Reporting Individual's Status

## SCHEDULE A

Page Number  
**7**

**Assets and Income**

**Block A**

Identify each asset held for the production of income which is an asset of the individual at the close of the reporting period.

Identify each asset or source of income which generated over \$200 in income during the reporting period.

None ☐

Line	Asset or Source of Income	Type	Amount	Actual Amount Only if "Other" specified	Date (Mo., Day, Yr.) Only if Hazardous
1	Deposit Guaranty Checking Greenville, MS 38701				
2	Deposit Guaranty Acct. Greenville, MS 38701	None			
3	Citizens Bank Savings Carthage, Tenn.				
4	Bank of Grenada Savings Grenada, MS				
5	Lincoln National Life Policy				
6	Lake, Tindall, Hunger & Thackston cash and capital assets			125,000	

05-11-93 03:40PM FROM JMD/OGC TO 95236325

832 (Rev. 10-1)  
6 CFR Part 264  
U.S. Office of Government Ethics

Reporting Individual's Name		BLOCK A										BLOCK B										BLOCK C										Page Number																														
Frank W. Hunger		Assets and Income										Valuation of Assets at close of reporting period										Income: type and amount. If "None (or less than \$201)" is checked, no other entry is needed in Block C for that item.										8																														
BLOCK A		BLOCK B										BLOCK C																																																		
Identify each asset held for the production of income which is a financial asset and is valued at \$1,000 at the close of the reporting period.		Identify each asset or source of income which generated over \$200 in income during the reporting period.										Type										Amount										Date (Mo., Day, Yr.)																														
None <input type="checkbox"/>		None (or less than \$1,001)										Over \$1,001 - \$15,000										Over \$15,001 - \$50,000										Over \$50,001 - \$100,000										Over \$100,001 - \$500,000										Over \$500,001 - \$1,000,000										Only if "Other" is specified
General Life Insurance		None (or less than \$1,001)										Over \$1,001 - \$15,000										Over \$15,001 - \$50,000										Over \$50,001 - \$100,000										Over \$100,001 - \$500,000										Over \$500,001 - \$1,000,000										Only if "Other" is specified
DC		None (or less than \$1,001)										Over \$1,001 - \$15,000										Over \$15,001 - \$50,000										Over \$50,001 - \$100,000										Over \$100,001 - \$500,000										Over \$500,001 - \$1,000,000										Only if "Other" is specified
J		None (or less than \$1,001)										Over \$1,001 - \$15,000										Over \$15,001 - \$50,000										Over \$50,001 - \$100,000										Over \$100,001 - \$500,000										Over \$500,001 - \$1,000,000										Only if "Other" is specified
1		None (or less than \$1,001)										Over \$1,001 - \$15,000										Over \$15,001 - \$50,000										Over \$50,001 - \$100,000										Over \$100,001 - \$500,000										Over \$500,001 - \$1,000,000										Only if "Other" is specified
2		None (or less than \$1,001)										Over \$1,001 - \$15,000										Over \$15,001 - \$50,000										Over \$50,001 - \$100,000										Over \$100,001 - \$500,000										Over \$500,001 - \$1,000,000										Only if "Other" is specified
3		None (or less than \$1,001)										Over \$1,001 - \$15,000										Over \$15,001 - \$50,000										Over \$50,001 - \$100,000										Over \$100,001 - \$500,000										Over \$500,001 - \$1,000,000										Only if "Other" is specified
4		None (or less than \$1,001)										Over \$1,001 - \$15,000										Over \$15,001 - \$50,000										Over \$50,001 - \$100,000										Over \$100,001 - \$500,000										Over \$500,001 - \$1,000,000										Only if "Other" is specified
5		None (or less than \$1,001)										Over \$1,001 - \$15,000										Over \$15,001 - \$50,000										Over \$50,001 - \$100,000										Over \$100,001 - \$500,000										Over \$500,001 - \$1,000,000										Only if "Other" is specified
6		None (or less than \$1,001)										Over \$1,001 - \$15,000										Over \$15,001 - \$50,000										Over \$50,001 - \$100,000										Over \$100,001 - \$500,000										Over \$500,001 - \$1,000,000										Only if "Other" is specified
Carlyle Real Est. Ltd.		None (or less than \$1,001)										Over \$1,001 - \$15,000										Over \$15,001 - \$50,000										Over \$50,001 - \$100,000										Over \$100,001 - \$500,000										Over \$500,001 - \$1,000,000										Only if "Other" is specified
State of La. Muni. Bonds		None (or less than \$1,001)										Over \$1,001 - \$15,000										Over \$15,001 - \$50,000										Over \$50,001 - \$100,000										Over \$100,001 - \$500,000										Over \$500,001 - \$1,000,000										Only if "Other" is specified
Travis County, Texas Muni Bonds		None (or less than \$1,001)										Over \$1,001 - \$15,000										Over \$15,001 - \$50,000										Over \$50,001 - \$100,000										Over \$100,001 - \$500,000										Over \$500,001 - \$1,000,000										Only if "Other" is specified
Hanover N.H. Bonds		None (or less than \$1,001)										Over \$1,001 - \$15,000										Over \$15,001 - \$50,000										Over \$50,001 - \$100,000										Over \$100,001 - \$500,000										Over \$500,001 - \$1,000,000										Only if "Other" is specified
Mass. G.O. Bonds		None (or less than \$1,001)										Over \$1,001 - \$15,000										Over \$15,001 - \$50,000										Over \$50,001 - \$100,000										Over \$100,001 - \$500,000										Over \$500,001 - \$1,000,000										Only if "Other" is specified
New Orleans Bonds		None (or less than \$1,001)										Over \$1,001 - \$15,000										Over \$15,001 - \$50,000										Over \$50,001 - \$100,000										Over \$100,001 - \$500,000										Over \$500,001 - \$1,000,000										Only if "Other" is specified



Frank W. Hunger

## SCHEDULE A

 Page Number  
 9

Income: type and amount. If "None (or less than \$201)" is checked, no other entry is needed in Block C for that item.

## BLOCK C

 Valuation of Assets  
 at close of  
 reporting period

## BLOCK B

## Assets and Income

## BLOCK A

Identify each asset held for the production of income which had a fair market value exceeding \$1,000 at the close of the reporting period.

Identify each asset or source of income which generated over \$200 in income during the reporting period.

 None ☐

 S. Control Address Common  
 DC Ex. Don Jones & Smith, Houston, USA  
 or single Memphis Equity Fund  
 J Don Jones & Smith pension plan

1 Shelby Co. Tenn. Bonds

2 Keogh Plan Asset Management by Deposit Guaranty National Bank \*

3 \*Dominion Resources Common

4 \*Sears Common

5 \*Hercules, Inc. common

6 \*General Motors Pref.

## Type

## Amount

Other (Specify Type)

Date (Mo., Day, Yr.)

Only if "Other" specified

Honoraria

Only if Honoraria

Date (Mo., Day, Yr.)

Only if Honoraria

Date (Mo., Day, Yr.)

Only if Honoraria

Date (Mo., Day, Yr.)

Only if Honoraria

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Date (Mo., Day, Yr.)

Only if Honoraria

Date (Mo., Day, Yr.)

Only if Honoraria







SP 726 (Rev. 1/91)

U.S. G.P.O. Form 2804

U.S. GOVERNMENT PRINTING OFFICE

Reporting Individual's Name

Frank W. Hunger

# SCHEDULE B

New Entrant/Nominee/Candidate:  
Schedule Not Applicable

Page Number

12

## Part I: Transactions

Report any purchase, sale, or exchange by you, your spouse, or dependent child during the reporting period of any real property, stocks, bonds, commodity futures, and other securities when the amount of the transaction exceeded \$1,000. Include transactions that resulted in a loss. Do not report a transaction involving property used solely as your personal residence, or a transaction solely between you, your spouse, or dependent child. Check the "Certificate of divestiture" block to indicate sales made pursuant to a certificate of divestiture from OGE.

B. Transaction Type (a)	Date (b), Day / Mo.	Description (c)	Amount of Transaction (d)	Certificate of Divestiture (e)
1	2/2/91	Example: General Address Commission	\$1,000	
2			\$1,000	
3			\$1,000	
4			\$1,000	
5			\$1,000	
6			\$1,000	
7			\$1,000	
8			\$1,000	
9			\$1,000	
10			\$1,000	
11			\$1,000	
12			\$1,000	
13			\$1,000	
14			\$1,000	
15			\$1,000	
16			\$1,000	
17			\$1,000	
18			\$1,000	
19			\$1,000	
20			\$1,000	
21			\$1,000	
22			\$1,000	
23			\$1,000	
24			\$1,000	
25			\$1,000	
26			\$1,000	
27			\$1,000	
28			\$1,000	
29			\$1,000	
30			\$1,000	
31			\$1,000	
32			\$1,000	
33			\$1,000	
34			\$1,000	
35			\$1,000	
36			\$1,000	
37			\$1,000	
38			\$1,000	
39			\$1,000	
40			\$1,000	
41			\$1,000	
42			\$1,000	
43			\$1,000	
44			\$1,000	
45			\$1,000	
46			\$1,000	
47			\$1,000	
48			\$1,000	
49			\$1,000	
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75			\$1,000	
76			\$1,000	
77			\$1,000	
78			\$1,000	
79			\$1,000	
80			\$1,000	
81			\$1,000	
82			\$1,000	
83			\$1,000	
84			\$1,000	
85			\$1,000	
86			\$1,000	
87			\$1,000	
88			\$1,000	
89			\$1,000	
90			\$1,000	
91			\$1,000	
92			\$1,000	
93			\$1,000	
94			\$1,000	
95			\$1,000	
96			\$1,000	
97			\$1,000	
98			\$1,000	
99			\$1,000	
100			\$1,000	

## Part II: Gifts, Reimbursements, and Travel Expenses

Report the source, a brief description (including travel, meals, and the nature of expenses provided), and the value of: (1) transportation, lodging, food, or entertainment received from one source totaling \$250 or more (unless received as personal hospitality at the donor's personal or family residence); (2) other gifts from one source totaling \$100 or more in value; and (3) cash reimbursements of \$250 or more from one source. Exclude gifts, reimbursements and travel expenses from the U.S. Government. Also exclude gifts from relatives, gifts of \$75 or less when aggregating gifts for the total from one source, and gifts from one source if the aggregate amount received by your spouse or dependent child that were not financially independent of the relationship to you. See instructions for further exclusions.

B. Transaction Type (a)	Date (b), Day / Mo.	Description (c)	Amount of Transaction (d)	Certificate of Divestiture (e)
1		Example: Gift of \$250 or more from one source	\$250	
2			\$250	
3			\$250	
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Reporting Individual's Name

Frank W. Hunger

# SCHEDULE C

Page Number

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## Part I: Liabilities

Report liabilities over \$10,000 owed to any one creditor at any time during the reporting period by you, your spouse, or dependent child. Check the highest amount owed during the reporting period. Exclude a mortgage on your personal residence unless it is rented out; loans secured by automobiles, household furniture or appliances; and liabilities owed to certain relatives listed in instructions. See instructions for revolving charge accounts.

Line	Creditor (Name and Address)	Type of Liability	Date Incurred		Term if applicable	Amount of Interest or Value					
			1981	1980		100,000 - 100,000	100,000 - 100,000	100,000 - 100,000	100,000 - 100,000	100,000 - 100,000	Over \$100,000
1	Example: First National Bank, Washington, DC John Jones, 1234 5th St., Washington, DC	Mortgage on rental property. Debt over Preliminary note			50 yrs.						
2											
3											
4											
5											

## Part II: Agreements or Arrangements

Report your agreements or arrangements for future employment, leave of absence, continuation of payments by a former employer (including severance payments), or continuing participation in an

employee benefit plan. See instructions regarding the reporting of negotiations for any of these arrangements or benefits.

None ☐

Line	Name and Nature of any Agreement or Arrangement	Period	Date
1	Example: Potentially reimbursable agreement with employer to pay payment of capital account & partnership share scheduled in services performed through 1981 and reduced pension benefit (independently managed, fully funded, defined contribution plan)	From Jones & Smith, Houston, USA	1980
2	Since earlier completion of the form, I have received a lump sum payment from my law firm for approximately one-third of earnings that I had left with the firm over the years. In addition to this, I expect to receive one more payment from those funds and payment of my capital account. (See asset valued on line 6, page 7). I would like to leave approximately one-third of my past earnings with the firm for which they will give me a note and pay me interest. An amount equal to my equity interest in the firm will be paid to me in monthly payments over a period of time now to exceed four years. (See asset at line 5, page 10).	Lake, Tindall, Hunger & Thackston	5/93
3			
4			
5			
6			

Reporting Individual's Name		Page Number				
Frank W. Hunger		14				
<b>SCHEDULE D</b>						
<b>Part I: Positions Held Outside U.S. Government</b> Report any positions held during the applicable reporting period, whether compensated or not. Positions include but are not limited to those of an officer, director, trustee, general partner, proprietor, representative, employee, or consultant of any corporation, firm, partnership, or other business enterprise or any non-profit organization or educational institution. Exclude positions with religious, social, fraternal, or political entities and those solely of an honorary nature.						
Examples	Organization (Name and Address)	Type of Organization	Position Held	From (Mo. Yr.) 1986	To (Mo. Yr.) Present	None <input type="checkbox"/>
		Non-profit, education Law firm	President Partner	1986	1991	
1	Lake, Tindall, Hunger & Thackston	Law Firm	General Partner	7/86	date	
2	Bank of Winona, Winona, MS	Bank	Director	1/80	date	
3	Trust for Karen, Kristen, Sarah & Albert Owen III	Trust	Trustee	12/84	present	
4	Vice President 5 <sup>th</sup> Judicial Circuit Bar Assn	Bar Association	Vice President	10/91	present	
5	5 <sup>th</sup> Judicial Circuit Bar Assn	Bar Association	Board Member	1994	"	
6	"	"	President-elect	10/93	—	
<b>Part II: Compensation In Excess Of \$5,000 Paid by One Source</b> Report sources of more than \$5,000 compensation received by you or your business affiliation for services provided directly by you during the reporting period. This includes the names of clients and customers of any corporation, firm, partnership, or other business enterprise, or any non-profit organization when you directly provided the services generating a fee or payment of more than \$5,000. You need not report the U.S. Government as a source.						
Examples	Source (Name and Address)	Legal services	Incumbent/ Termination Fee/ Candidate: Not Applicable	None <input type="checkbox"/>		
	Don Jones & Smith, Houston, USA	Legal services				
1	Wesley University (John J. Don Jones & Smith, Mississippi, USA)	Legal services in connection with university construction				
2	Lake, Tindall, Hunger & Thackston Greenville, MS 38701	Partnership income from law firm				
3	Bank of Winona, Winona, MS 38967	Director				
4						
5						
6						



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Reporting Individual's Name <b>Frank W. Hunger</b>	<b>SCHEDULE D</b>	Page Number <b>15</b>
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### Part I: Positions Held Outside U.S. Government

Report any positions held during the applicable reporting period, whether compensated or not. Positions include but are not limited to those of an officer, director, trustee, general partner, proprietor, representative, employee, or consultant of any corporation, firm, partnership, or other business enterprise or any non-profit organization or educational institution. Exclude positions with religious, social, fraternal, or political entities and those solely of an honorary nature.

Examples	Organization (Name and Address)	Type of Organization	Position Held	From (Mo. Yr.) 1991	To (Mo. Yr.) 1991	None <input type="checkbox"/>
1	NIST Ames, of Rockwell International, Inc., One Jones & Smith, Houston, USA	Non-profit, education Law firm	President Partner	1985		
2						
3						
4						
5						
6						

### Part II: Compensation In Excess Of \$5,000 Paid by One Source

Report sources of more than \$5,000 compensation received by you or your business affiliation for services provided directly by you during the reporting period. This includes the names of clients and customers of any corporation, firm, partnership, or other business enterprise, or any non-profit organization when you directly provided the services generating a fee or payment of more than \$5,000. You need not report the U.S. Government as a source.

Incumbent/  
Termination  
Candidate: ☐  
Not Applicable ☐  
None ☐

Examples	Source (Name and Address)	Brief Description of Duties	
		Legal services	Legal services in connection with university construction
1	Don Jones & Smith, Houston, USA Mississippi University of Education & Science, Mississippi, USA		
2	American Honda Motor Co., Inc. and Honda North America, Inc. Torrance, California		Legal services in connection with litigation
3	Chevron, U.S.A., Houston, Texas		Legal services in connection with litigation
4	Mississippi Municipal Services, Jackson, MS		Legal services in connection with litigation
5	Mutual Insurance of New York, New York, NY		Legal services in connection with litigation
6	Allstate Insurance Company, Jackson, MS		Legal services in connection with litigation

Reporting Individual's Name <b>Frank W. Hunger</b>	<b>SCHEDULE D</b>	Page Number <b>16</b>
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### Part I: Positions Held Outside U.S. Government

Report any positions held during the applicable reporting period by you or your spouse, partner, or dependent child, whether compensated or not. Positions include those not limited to those of an officer, director, trustee, general partner, proprietor, representative, employee, or intern. Report positions held by you or your spouse, partner, or dependent child as a sole proprietor, partner, or proprietor of a firm, partnership, or other business enterprise or any non-profit organization or educational institution. Exclude positions with religious, social, fraternal, or political entities and those solely of an honorary nature.

 None ☐

Examples	Name (Last, First, Middle Initial) Doi Jones & Smith, Washington, USA	Organization (Name and Address) Natl. Assn. of Black Colleges, NY, NY	Type of Organization Non-profit, education Law firm	Position Held President Partner	From (Mo., Yr.) 6-62	To (Mo., Yr.) 1-66
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### Part II: Compensation In Excess Of \$5,000 Paid by One Source

Report sources of more than \$5,000 compensation received by you or your spouse, partner, or dependent child during the reporting period. This includes the names of clients and customers of any corporation, firm, partnership, or other business enterprise, or any non-profit organization when you directly provided the services generating a fee or payment of more than \$5,000. You need not report the U.S. Government as a source.

 Incumbent/  
Termination File/  
Candidate: ☐  
Not Applicable ☐

Source (Name and Address)		Brief Description of Duties	
Examples Doi Jones & Smith, Washington, USA Mere University (client of Doi Jones & Smith), Washington, USA		Legal services Legal services in connection with university construction	
1	Stein Mart, Inc., Jacksonville, Florida	Legal services in connection with corporate advice	
2	John Deere Insurance Company, Moline, Ill.	Legal services in connection with litigation	
3	CIGNA, Inc., Tampa, Florida 33602	Legal services in connection with litigation	
4	Northbrook Ins. Co., Atlanta, Ga.	Legal services in connection with litigation	
5	Shelter Insurance Company, Columbia, MO	Legal services in connection with litigation	
6	Zurich Insurance Company, Jackson, MS	Legal services in connection with litigation	



U.S. Department of Justice

MAY 11 1993

Washington, D.C. 20530

Stephen D. Potts  
Director  
Office of Government Ethics  
Suite 500  
1201 New York Avenue, N.W.  
Washington, D.C. 20005-3919


Dear Mr. Potts:

In accordance with the provisions of Title I of the Ethics in Government Act of 1978 as amended, I am forwarding the financial disclosure report of Frank W. Hunger who has been nominated by the President to serve as Assistant Attorney General for the Civil Division, Department of Justice.

We have conducted a thorough review of the enclosed report, and have counseled Mr. Hunger extensively. Among other things, he has been counseled to recuse himself or seek a waiver before participating in any matters affecting his financial interests. Mr. Hunger understands that this would include matters involving his former law firm, so long as he retains an interest in the firm. We do not anticipate that Mr. Hunger's ability to serve the government will be impaired significantly by the retention of any of his financial interests including any retention of a financial interest in the law firm. We also have advised Mr. Hunger that his name must be removed from that of his law firm as required by 5 U.S.C. app § 502.

In light of this counseling, I am satisfied that the report presents no conflicts of interest under applicable laws and regulations and that you can so certify to the Senate Judiciary Committee. We believe that the only ethics agreements, as contemplated by Subpart H of 5 CFR § 2634, would be Mr. Hunger's agreement to resign from the board of directors of the Bank of Winona and to remove his name from that of his law firm.

Sincerely,

  
Stephen R. Colgate  
Assistant Attorney General  
for Administration

Enclosure



# NOMINATION OF WALTER DELLINGER TO BE ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, AND ELEANOR ACHESON TO BE ASSISTANT ATTORNEY GENERAL, OFFICE OF POLICY DEVELOPMENT

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TUESDAY, JUNE 22, 1993

U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The committee met, pursuant to notice, at 10:41 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Joseph R. Biden, Jr. (chairman of the committee), presiding.

Also, present: Senators Kennedy, Metzenbaum, Feinstein, Hatch, Thurmond, Grassley, and Pressler.

## OPENING STATEMENT OF CHAIRMAN BIDEN

The CHAIRMAN. The hearing will come to order. Let me explain, as we begin, the absence of my colleagues. It is not a lack of interest in the two nominees we have today. It was announced on Thursday that we would have a vote at 10:30 on the Senate floor today, and a number of us went over to vote so we could go uninterrupted with this hearing. There is no vote at 10:30. It has been temporarily delayed, so I thought we should just begin, although we may be interrupted early on by a vote, and I apologize particularly to our colleague from the House.

Today, we meet to consider the nomination of Walter Dellinger to become Assistant Attorney General for the Office of Legal Counsel, and Eleanor Dean Acheson to become Assistant Attorney General for the Office of Policy Development, both within the Department of Justice.

We will begin with Professor Dellinger, a man who has devoted his professional career to thinking, writing, and teaching about our Constitution. I might add I think he is probably one of the best teachers in the country and clearly one of the Nation's leading constitutional scholars because if he can teach me to understand some very complicated issues, I am confident his students have benefited over the years immeasurably. His scholarship has distinguished him as one of the leading constitutional law experts in our country, and he is certainly no stranger to the committee.

Professor Dellinger is nominated to one of the most important posts within the Department of Justice, the Assistant Attorney General for the Office of Legal Counsel. The Office has been described as the Attorney General's lawyer. More broadly, however,

the Office of Legal Counsel serves as the general counsel for the entire Justice Department. In addition, the Office serves the executive agencies as an outside counselor of sorts.

In its varied roles, the Office of Legal Counsel opines on a host of thorny legal opinions, questions ranging from the mundane to the profound. The OLC helps the President identify the bounds of Executive power, which on occasion Presidents need identified for them, in my 20 years of experience here. It offers advice on the scope of our treaties and laws which we often need, and it reviews the position of the Justice Department itself to assist in determining what arguments to adopt before courts of law.

For these reasons, the Assistant Attorney General for the Office of Legal Counsel must bring to his or her office a real commitment to scholarship and a high regard for the Constitution. The occupant of the Office should jealously guard the integrity of the Department so Americans may know that the Department earns its namesake; that is, by seeking justice for all citizens.

Today, I will ask Professor Dellinger about his commitment to protecting the integrity of the Department and the Office of Legal Counsel. In addition, I will ask Professor Dellinger a bit about his scholarly work. He is a prolific writer, and I will explore with him a few of the issues presented in his scholarship.

After we conclude our questioning of Professor Dellinger, we will hear from Eleanor Acheson, who is nominated to become Assistant Attorney General of the Office of Policy Development. Ms. Acheson has distinguished herself as a prominent member of the bar and she is a partner in one of Boston's well-known law firms.

The Office of Policy Development, or OPD, as it is often known, is of great importance to the Department. It is within this Office that the Department's agenda is set. The Office of Policy Development deals with all issues, such as crime policy and civil justice reform, and these are debated and made coherent within her Office and will be then put forward by the Attorney General. In addition, the Office of Policy Development has traditionally played a significant role in the judicial selection process.

Both the President and the Attorney General have articulated an intention to pursue innovative policies in a number of areas. If confirmed, Ms. Acheson will be at the forefront of the development of these policies. For these reasons, I will ask Ms. Acheson about her view of the role of the Office and her expectations for its activities.

In addition, I expect to have some questions about a subject close to the hearts of the members of this committee—the selection of Federal judges. As I have with all Justice Department nominees, I will have some questions about how Ms. Acheson will maintain the integrity and independence of her office.

I am pleased to welcome both of our nominees today and I look forward to hearing their thoughtful responses to our questions as we undertake the constitutional responsibility of advice and consent. I might add before I ask Professor Dellinger to come forward that Ms. Acheson will be introduced formally at 2:30. Senator Kennedy wants very much to be here to do that.

As I said, we may be interrupted, but now I would like to call forward, if we may, Congressman David Price, an old friend from North Carolina, and Attorney General Mike Easley of North Caro-

lina, if they would come forward and introduce Professor Dellinger, who is, as well know, no stranger to this committee.

While they are being seated, I yield to my colleague, Senator Pressler.

#### **OPENING STATEMENT OF SENATOR PRESSLER**

Senator PRESSLER. Thank you, Mr. Chairman. I would like to join my colleagues in welcoming to the committee the Assistant Attorney General nominees, Mr. Dellinger and Ms. Acheson. As is evident from their biographies, both nominees possess exemplary legal backgrounds and have demonstrated a sincere commitment to the law throughout their lives. I commend them for their dedication and I congratulate them on their nominations.

Mr. Dellinger, the Office of Legal Counsel which you have been nominated to lead performs several important functions. It acts as legal advisor to the Attorney General on a broad range of legal issues for which the Department of Justice is responsible.

We have been very intrigued in my State when conflicting legal opinions are issued by different agencies of the same Federal Government. It is my understanding the Office of Legal Counsel resolves those legal differences. For example, currently there is a major difference regarding the interpretation of a regulation concerning gasohol. The EPA and other agencies have had a legal difference in the interpretation of certain things. There also have been different interpretations on matters of Indian jurisdiction. We know that the Office of Legal Counsel is a very important one and I will be submitting a number of questions concerning these differences.

Both the Office of Legal Counsel and the Office of Policy Development play a significant role in shaping the Justice Department position on issues which affect the entire Nation. I look forward to working with you, and I shall have many questions to submit for the record if I am not here in person to ask them.

The CHAIRMAN. Thank you very much.

David, welcome. As they say, it is a long walk to the other body, from the other body.

#### **STATEMENT OF HON. DAVID E. PRICE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NORTH CAROLINA**

Mr. PRICE. A long walk on a very pleasant morning, though, and I appreciate your welcome and the opportunity to appear alongside our distinguished attorney general from North Carolina, Mike Easley, to introduce Walter Dellinger, President Clinton's nominee for Assistant Attorney General for the Office of Legal Counsel. This gives me special pleasure because Walter is a friend of long standing. For years, we were colleagues on the Duke University faculty, and now he is a constituent of mine in North Carolina's Fourth District.

I first got to know Walter in the early 1960's when we were both students at the University of North Carolina at Chapel Hill. We were both attracted to student government in those days and we were shaped by the civil rights struggle that swept over the South during that period.



We both then went north to Yale for professional training, where Walter distinguished himself at the law school and then acted on his commitment to the South and to social justice by returning south to teach law for 2 years at the University of Mississippi.

Walter next clerked for Justice Hugo Black, and then came back to North Carolina to begin a 24-year teaching career at Duke University School of Law. During these years, Walter has taught thousands of law students in a widely acclaimed set of courses. He has proved himself an able administrator. He has published widely, actively practiced law, and contributed greatly to government and to the formation of public policy in North Carolina and the Nation.

To his continuing work for racial reconciliation, Walter has added commitments to full equality for women, reproductive liberty, the faithful application of the first amendment, and legal reform. His scholarship is recognized nationally and internationally. He has lectured in Italy, Germany, Denmark, the Netherlands, Belgium, and has been sent by this country to assist Brazil in the drafting of a new constitution.

With all of this, Walter has still kept a commitment to our local community where he has served on PTA boards, coached in sports leagues, and helped deliver hot meals to shut-ins in the Meals on Wheels Program. In short, Walter is an exemplary citizen.

Of particular relevance to the position for which he has been nominated is his distinction in the practice of law. Walter is well known as a skilled lawyer and a powerful oral advocate. His 1990 argument for the Virginia Hospital Association was described by numerous observers as the best argument heard in the U.S. Supreme Court during that term. His clients have included bar associations, Members of the House and Senate, the State of Alaska, one of the Nation's largest corporations, each of which he has represented on matters of the greatest importance.

So it is these accomplishments in the law, his ability, as well as his character and his distinguished record of public service—all of this joins together today to make me very proud and very pleased to introduce him to this distinguished committee.

[The prepared statement of Mr. Price follows:]

#### PREPARED STATEMENT OF REPRESENTATIVE DAVID E. PRICE

Mr. Chairman, I appreciate the opportunity to appear before you today to introduce Walter Dellinger, President Clinton's nominee for Assistant Attorney General for the Office of Legal Counsel. Walter is a friend of long standing, a colleague of many years on the Duke University faculty, and now a constituent in North Carolina's fourth district. I first got to know Walter in the early 1960s when we were both students at the University of North Carolina at Chapel Hill. We were both attracted to student government and shaped by the civil rights struggle that swept over the South in those years. We both then went north to Yale for professional training, where Walter distinguished himself at the Law School and then acted on his commitment to the South and to social justice by teaching law for two years at the University of Mississippi.

Walter next clerked for Justice Hugo Black and then came back to North Carolina to begin a twenty-four year teaching career at Duke University's School of Law. During these years, Walter has taught thousands of law students in widely acclaimed courses, proved himself an able administrator, published widely, actively practiced law, and contributed greatly to government and the formation of public policy in North Carolina and the nation.

To his continuing work for racial reconciliation, he has added commitments to full equality for women, reproductive liberty, the faithful application of the First Amendment, and legal reform. His legal scholarship is recognized nationally and inter-

nationally. He has lectured at leading universities in Italy, Germany, Denmark, the Netherlands and Belgium and has been sent by the United States to assist Brazil in the drafting of a new constitution. With all this, Walter has still made the commitment to being a valuable member of our local community, serving on PTA boards, coaching in a youth sports league, and helping deliver hot meals to shut-ins for the Meals-on-Wheels program.

Of particular relevance to the position for which he has been nominated is Walter's distinction in the practice of law. He is known as a skilled lawyer and powerful oral advocate. His 1990 argument for the Virginia Hospital Association was described by numerous observers as the best argument heard in the United States Supreme Court that term. His clients have included bar associations, members of the House and Senate, the state of Alaska, and one of the nation's largest corporations, each of which he represented on matters of the greatest importance. His ability and accomplishments in the law, joined to his character and distinguished record of public service, are the sources of my pride and pleasure in introducing him to you today.

The CHAIRMAN. Thank you very much, Congressman.  
Attorney General.

### STATEMENT OF MIKE EASLEY, ATTORNEY GENERAL, STATE OF NORTH CAROLINA

Mr. EASLEY. Thank you, Mr. Chairman. I, too, am truly honored to be here before this committee today, and I appreciate Walter Dellinger asking Congressman Price and me to present him. To us in North Carolina, Walter Dellinger is the finest example of a true public service lawyer, and I appreciate the opportunity to support his confirmation for the Office of Legal Counsel.

I did a little research on this Office and found that the first appointment was back in 1935 by Franklin Roosevelt, and he appointed a gentleman by the name of Angus McLean from North Carolina. Angus McLean was a country lawyer from a little town called Little Washington in eastern North Carolina, and apparently he missed the country lawyer practice because after only 6 months of duty here in Washington, he quit and returned to Little Washington.

So before I go any further, I want to tell you that if Walter Dellinger is confirmed, and I hope that he will be, we will not try and sell him to you as just a country lawyer. With his degrees from Yale and his Duke University teaching career, he is more than that. He is a constitutional scholar, and I can assure you that we will not let him back into the State of North Carolina until you have exacted from him a sufficient amount of work here in Washington.

The CHAIRMAN. What was your undergraduate school, General?

Mr. EASLEY. The University of North Carolina.

The CHAIRMAN. I am just curious. I am surprised you all talk to one another. I sense a kind of cross-pollination with you all here, but my limited experience of campaigning down that way is that the only place I find it more intense is in South Carolina if you accidentally mention at the University of South Carolina that you have been over to visit Clemson. But other than that, I just wondered. I was just curious. Anyway, go ahead. I am sorry.

Mr. EASLEY. I think it is because he lives in Chapel Hill that gives him some tolerance for the Tar Heel fans.

The CHAIRMAN. I see, I see.

Mr. EASLEY. I think since the time of Angus McLean, there has been, Mr. Chairman and members of the committee, a tradition that no matter which party occupies the White House, the persons



who occupy the Office of Legal Counsel have been of great intelligence and professional accomplishment. That goes back as far in the Republican administrations as Chief Justice Rehnquist, Justice Scalia, and in the Kennedy administration, Nicholas Katzenbach. I think the nomination of Walter Dellinger continues this important tradition.

His professional accomplishments are many and significant, and you know most of those. He is a constitutional scholar with a distinguished teaching degree and career. He is an accomplished appellate advocate in State and Federal courts and the U.S. Supreme Court, and he was one of the primary draftsmen for our North Carolina Criminal Code Commission which provided the criminal procedure system that we currently operate under and have for better than 15 years in our State.

But Walter Dellinger is much more than just an outstanding lawyer, teacher, and scholar. He has a lifelong commitment and passionate belief in the special role of lawyers to serve the public. This commitment permeates his career as a pro bono attorney on appellate litigation, as a pro bono counsel for nonprofit organizations, providing help for women and children, and even as a Meals on Wheels volunteer back in his home town of Chapel Hill where he provides hot meals for those who cannot provide for themselves.

I have seen his public spirit, and seen it touch those, even his students, to embrace the obligations and the rewards of public service. Walter's family are also very strongly public-spirited. His wife, Anne, who is seated behind me in the plaid, is an attorney and professor at North Carolina's Institute of Government. It is her job and duty to advise local and State officials on the law, and she specializes in health care law. His sons, Hampton and Drew, both have been very much involved as students in the political and civic processes. His sister, Barbara, who is here today, directs North Carolina's largest Head Start Program. Barbara is seated next to Anne in the blue suit.

Combined with a deep personal commitment to public service, Walter has what I think is the most important quality, and that is balance, along with the integrity that is especially important to the Office of Legal Counsel. He has a unique ability not only to understand and explain the law, but he can bring people together to solve common problems by using the law, and that skill was particularly evident with his work on the Criminal Code Commission, where he brought together defense lawyers and prosecutors, judges, law enforcement officers, and the public to accept and appreciate the criminal procedure that we now have in North Carolina.

Let me end by saying personally I appreciate his balance and objectivity when I have had to turn to him as district attorney and as attorney general for advice on complex constitutional and procedural problems. I have always found him to not only give me the advice which I have sought, but his advice was always balanced and objective and clear about the available alternatives and options. I am confident that Walter will serve this administration the same way.

So, Mr. Chairman, I want to thank you and the committee for letting me appear here today and commend Walter Dellinger to you, and I hope that you will confirm him.



Thank you.

The CHAIRMAN. I thank you very much, General.

Senator Thurmond.

Senator THURMOND. I just want to welcome all you good people here today. Mr. Attorney General, I want to commend Joan Byers. Isn't she a deputy to you as attorney general?

Mr. EASLEY. Yes, she is, Senator.

Senator THURMOND. She has been very helpful to this committee in efforts to reform habeas corpus and I wish you would pass on to her our appreciation.

Mr. EASLEY. I certainly will, and I appreciate your mentioning that.

Senator THURMOND. Thank you very much. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

First of all, I acknowledge you have many other things to do. You are welcome to stay, both of you, but I understand that you have other responsibilities and duties. So you are welcome to stay and join us, but I understand if you have to leave, and I thank you both for coming.

I am going to ask Professor Dellinger to stay standing and be sworn.

Would you please raise your right hand? Do you swear that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. DELLINGER. I do.

The CHAIRMAN. Thank you very much. Welcome, professor. Before we begin, your family was referenced, but would you formally introduce them to the committee?

# **TESTIMONY OF WALTER DELLINGER, TO BE ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, U.S. DEPARTMENT OF JUSTICE**

Mr. DELLINGER. I would be proud to, Senator. Here is my wife of 28 years? Twenty-years; I am definite on that.

The CHAIRMAN. Good start. [Laughter.]

You are a lot better off. I just had my 16th wedding anniversary and had to remind my wife it was an anniversary, so it is a little reversed in my family. [Laughter.]

Congratulations.

Mr. DELLINGER. Anne is a professor of law and government at the Institute of Government at UNC-Chapel Hill. My son, Hampton Dellinger, is here. I just had the pleasure of watching him cross the stage at Yale Law School and turn from a liability into an asset. [Laughter.]

With him is his friend and my student, Jo Lynn Childers, who just graduated from Duke. My sister, Pam Swinney, is here, an accountant in Charlotte; her husband, Jack; her daughter, Haze Swinney. My son, Andrew, is in the wilderness of Arizona; my sister, Barbara, who, as Mike Easley said, has worked in poverty programs in Charlotte for most of her life and now directs the Head Start Program, a job considerably more difficult, I think, than the jobs any of us have.

Finally, here in spirit, or electronically, is my mother, Grace Dellinger, of Charlotte, who was not quite up to the trip, but is a regular, constant, and faithful viewer of C-SPAN.

The CHAIRMAN. She sent in some questions. [Laughter.]

Mr. DELLINGER. I am not surprised, and she was a widow at the age of just before 40 and raised these three children, Barbara, Pam, and myself, by being an excellent salesperson of men's clothing. Therefore, she still, though retired from that occupation, selects my ties for me, and I would like to express my appreciation to her and say hi, mom.

The CHAIRMAN. Well, thank you very much. Well, we welcome your family, and I hope I get all the questions your mother wanted me to ask correctly. With that, why don't you begin, if you will, professor, with your opening statement?

Mr. DELLINGER. Well, Senator, I am honored to have been chosen by the President and the Attorney General for nomination as Assistant Attorney General for the Office of Legal Counsel. I believe that history will see it as a singular honor to have had the opportunity to have served in the Department of Justice under the leadership of Janet Reno. I believe she will be considered one of the great Attorneys General.

I have some experience in the Department. Thirteen years ago when Anne came to Washington to serve at the Federal Bureau of Investigation as the special assistant to the then Director of the FBI, William Webster, I had the opportunity to spend the better part of that year in the Civil Appellate Division.

While I was there, the dedicated career attorneys, virtually all of whom are still there—people like Robert Kopp and Tony Steinmeyer—took a somewhat mushy, theoretical law professor and taught me a great deal about what professional lawyering and commitment to public service really mean. It would be a great pleasure for me to rejoin them at the Justice Department, and I would be especially pleased, if confirmed, to have the opportunity to head the Office of Legal Counsel.

That Office assists the Attorney General in carrying out her responsibility to give "advice and opinion upon questions of law when required to do so by the President of the United States," a statutory duty that the Department has had since the enactment of the first Judiciary Act in 1789.

The Office has a truly distinguished tradition for legal excellence. If I am confirmed, it will be my primary goal to continue this tradition and to strive to give the best independent legal analysis possible. As part of the executive branch, OLC serves the President, but, functioning as outside counsel, it is the obligation of the Office to give the President detached, objective advice even if what turns out to be the best legal answer is not what the President was hoping to hear.

Why is this important? That answer, I think, benefits from looking back 200 years. It is all too easy for those of us who now enjoy the benefits of constitutional government to forget how extraordinarily difficult it was to achieve the adoption of a lasting Constitution. I am reminded of this difficulty every spring semester when I teach a seminar called the Seminar of 1787, in which we

read the debates as recounted in Madison's diaries and the evolving drafts at the Constitutional Convention.

The coming together of the American colonies into a single nation was a more remarkable achievement than we can easily now imagine. John Adams wrote him from the Continental Congress in 1775 to the remarkable Abigail and described, "[f]ifty gentlemen meeting together all strangers \* \* \* not acquainted with each other's language, ideas, views, designs." "Not acquainted with each other's language"—it makes one wonder if the accents were that different. "They are," he wrote to Abigail, "therefore jealous of each other—fearful, timid, skittish."

Just about 206 years ago this week, on July 5, the Constitutional Convention returned from its 2-day Fourth of July recess. Yes, they did, one decade into the American Nation, take a Fourth of July recess to celebrate the declaration 11 years earlier. At that point, the Convention appeared to be on the brink of failure, hopelessly deadlocked over the allocation of power between large States and small, a debate, Mr. Chairman, in which your State, Delaware, played a particularly recalcitrant role, if I may editorialize.

The CHAIRMAN. I might point out they succeeded in making sure that we had two Senators and California only has two.

Mr. DELLINGER. Exactly. That recalcitrance, I think, pays off today, as you would view it.

The CHAIRMAN. I am chairman of the committee and they aren't. [Laughter.]

Mr. DELLINGER. Right.

The CHAIRMAN. I like that.

Mr. DELLINGER. Let me say that I can understand that salutary development in the Convention.

Well, as the Convention threatened to break apart, Gouverneur Morris of Pennsylvania, who was, I think, in many ways the most eloquent of the delegates, gave voice to both the hopes and fears of his colleagues. Madison recounts Morris as saying on that fateful day as the Convention appeared ready to fall apart—Morris said,

He came here as a Representative of America; he flattered himself he came here in some degree as a Representative of the whole human race; for the whole human race will be affected by the proceedings of this Convention.

We may today doubt whether Morris and his colleagues could in any meaningful sense represent the whole human race. We cannot doubt, however, that the whole human race was to be affected by the Convention's proceedings. The work produced during that summer was a charter of government whose writ runs two centuries later and now stretches from Philadelphia to the outer parts of Hawaii and the Arctic Range of Alaska. The work of the Philadelphia Convention has lasted longer and served better as a foundation for free government than any other constitution ever written.

That is in the background of the discussions in my mind that I have had over the past few weeks with the distinguished attorneys who have previously served as head of the Office of Legal Counsel. Those who have served in that Office share a truly extraordinary devotion to the law, to the Office, and to its mission of providing trenchant analysis and objective legal advice.

Ted Olsen, who served at OLC as its head in 1980–81 through 1984 in the first Reagan administration, shared with me a state-



ment written by one of his deputies, Robert Shanks, who wrote that

\* \* \* it is important to note that OLC is not a part of the official policy-making apparatus of the Department. It exists to provide the best possible legal advice in response to questions concerning the legality of proposed Executive actions. The trust and credibility of the Office—its reason for existing—would be diminished to the extent that partisan political considerations were perceived as affecting its best legal judgment. \* \* \* The President, members of the Cabinet, and the legal counsel of the departments are entitled to no less

than the best possible legal advice based on an independent reading of the law.

The Office thus plays a significant role in maintaining and nourishing our profound national commitment to constitutionalism and to the rule of law; to the idea, that is, that government must be guided not by partisan preference or raw power, but by enduring principles binding even on government itself.

As we embark upon our third century of government under that Constitution, I cannot begin to convey what an honor it would be for me to play even a small part for a short time in the ongoing process of making that Constitution work.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Dellinger follows:]

#### PREPARED STATEMENT OF PROFESSOR DELLINGER

Chairman Biden, and Members of the Committee—I am deeply honored to have been chosen by the President and the Attorney General for nomination as Assistant Attorney General for the Office of Legal Counsel. I believe that it will be seen as a singular honor to have served in the Department of Justice under the leadership of Janet Reno.

Thirteen years ago, when my wife, Anne, came to Washington to serve at the Federal Bureau of Investigation as Special Assistant to the then Director of the FBI, Judge William Webster, I had the opportunity to spend the better part of a year as a professor in residence in the Appellate Section of the Civil Division. While I was there, dedicated career attorneys like Robert Kopp and Anthony Steinmeyer taught me a great deal about what professional lawyering and dedicated public service are all about.

I would be very pleased to rejoin them at the Justice Department and especially pleased, if confirmed, to have the opportunity to head the Office of Legal Counsel. The Office assists the Attorney General in carrying out her responsibility to give "advice and opinion upon questions of law when required to do so by the President of the United States"—a statutory duty the Department has had since enactment of the first Judiciary Act of 1789.

This Office has a truly distinguished tradition for legal excellence. If I am confirmed, it will be my foremost goal to continue this tradition and to strive to give the best independent legal analysis possible. As part of the Executive Branch, OLC serves the President; it is the obligation of the office, however, to function as outside counsel, and to give the President detached and objective advice, even when the best legal answer is not what the President was hoping to hear.

It is all too easy for those of us who enjoy the benefits of constitutional government to forget how extraordinarily difficult it was to achieve the adoption of a lasting Constitution—a difficulty of which I am reminded every year as I teach a course devoted to the debates in the Philadelphia Convention and to the drafting of the Constitution. The coming together of the American colonies into a single nation is a more remarkable achievement than we can easily now imagine. John Adams wrote home to Abigail from the Continental Congress and described "[f]ifty gentlemen meeting together all strangers \* \* \* not acquainted with each other's language, ideas, views, designs. They are therefore jealous of each other—fearful, timid, skittish."

On Thursday, July 5, 1987, the Constitutional Convention was just back from its two day Fourth of July recess in honor of the independence declared a decade earlier. The Convention appeared hopelessly deadlocked over the allocation of power between large states and small. As the Convention threatened to break apart,

Gouverneur Morris of Pennsylvania gave voice to both the hopes and fears of the delegates. "He came here," Madison recounts Morris as saying, "as a Representative of America; he flattered himself he came here in some degree as a Representative of the whole human race; for the whole human race will be affected by the proceedings of this Convention."

We may, in our time, doubt whether Morris and his colleagues could represent the whole human race; we cannot doubt, however, that the whole human race was to be affected by the Conventions' proceedings. The work produced during those four months in the summer of 1787 was a charter of government whose writ yet runs, and now reaches from Philadelphia to the Arctic Range of Alaska. The work of the Philadelphia Convention has lasted longer and served better as a foundation for free government than any other constitution ever written.

I have had the good fortune over the past few weeks to speak with a number of distinguished attorneys who have previously served as head of the Office of Legal Counsel. Those who have served in the Office of Legal Counsel share a truly extraordinary devotion to the law, to the Office, and to its mission of providing trenchant analysis and objective legal advice. Ted Olsen, who served as head of OLC during the first Reagan Administration, shared with me a statement by his deputy, Robert Shanks, that expresses well the sentiment of appointees from both Republican and Democratic Administrations who are committed to the traditions of the Office. Shanks wrote: "\* \* \* it is important to note that OLC is not a part of the official policy-making apparatus of the Department. It exists to provide the best possible legal advice in response to questions concerning the legality of proposed Executive actions. The trust and credibility of the Office—its reason for existing—would be diminished to the extent that partisan political considerations were perceived as affecting its best legal judgment. The Office therefore has strongly resisted the temptation to allow political pressures to affect its ability to render the best possible legal advice, based on an independent reading of the law. The President, members of the Cabinet, and the legal counsel of the departments are entitled to no less."

The Office thus plays a significant role in maintaining and nourishing our profound national commitment to constitutionalism and to the rule of law—to the idea that government must be guided not by partisan preference or raw power but by enduring principles binding even on government itself.

As we embark upon our Third Century of government under that Constitution, Mr. Chairman, I cannot begin to convey what an honor it would be for me to play even a small part, for a short time, in the ongoing process of making that Constitution work.

The CHAIRMAN. Thank you, professor. Well, let me begin and we will keep it to 10 minutes in the first round. How do you intend to accomplish what you just spoke to, which is to essentially insulate your Office from potential political pressures from the White House? You are hired by and you serve at the pleasure of the very person you are concerned about—not you, but people have written about in terms of maintaining your independence from the President and the Attorney General.

Mr. DELLINGER. Well, Senator, I begin with my own personal commitment to the proposition that the President—this President, any President, is best served by having in the Department of Justice a restraining influence on issues of legitimacy, regulatory, and legality; that those Presidential administrations are more likely to succeed if there is within the administration an office which is firmly committed to ensuring that the President has the best legal advice.

I have met with the lawyers who have been at the Office of Legal Counsel. I have looked forward to a good working relationship. I have made it clear to them that there will be no partisan or ideological test in our hiring, that we are going to be looking for the best attorneys we can find for the Office.

And I think as well that it is important to have the activities of the Office be limited insofar as possible to providing objective legal advice and analysis, and I will do whatever I can to keep that Of-



fice away from issues that may involve matters of policy and politics so that there will be some place in the Department of Justice and the Government that is particularly free of those influences insofar as that is possible.

The CHAIRMAN. Professor, do you make a distinction between—well, first of all, is it appropriate for anyone in the White House, in your view, or the President himself to contact you directly for legal advice?

Mr. DELLINGER. Yes, in fact, I believe that it should be—that components of the Government should be encouraged to seek the advice of the Office, though I think all contacts ought to go through the White House counsel's office. But in the statement that Deputy Attorney General Heymann submitted to the committee, they indicated that all contacts with the Justice Department should go through the senior officials of the Department—the Attorney General, the Deputy Attorney General, the Associate Attorney General—and the Office of Legal Counsel should receive inquiries.

I mean, our goal will be to encourage insofar as possible officials in the executive branch who are contemplating taking actions that may conceivably have legal questions to seek our advice before they do so.

The CHAIRMAN. What do you consider the proper balance between offering legal advice to the Attorney General—that is, stating what you believe the law to be—and advancing a particular policy position to the Attorney General?

Mr. DELLINGER. I don't see the Office of Legal Counsel as having a policy role or policies of its own at all. I believe that good lawyering of the kind one would do for a private client may well involve suggesting alternatives to a client as to how a client might achieve his or her objectives in a legal and proper way; that is, if an inquiry comes to the Office, can we do *x*, we may have to say, we regret to inform you that the law does not permit that; however, part of what you wish to accomplish you might try a different way to formulate or structure your policy. So that to that extent, we can——

The CHAIRMAN. You have written about the independence of the Solicitor General. I will not take the time to quote it. I ask unanimous consent that a reference to something you wrote relating to the Solicitor General be entered in the record at this point.

[The information referred to follows:]

The Solicitor General is not expected to be just another "Gun for Hire" whose client happens to be the Government.

The CHAIRMAN. Let me ask you this. Do you believe that your job, the job we hope to confirm you to shortly, should be as insulated as the job of Solicitor General, or is it a step closer? The fact of the matter is I know from personal experience that your advice and counsel is relied upon. I can't imagine the Attorney General not seeking your advice in both your official capacity and also just calling you in the office and saying, gee, Walter, what do you think about such-and-such. Unfortunately, in a strange way, your reputation precedes you. You are a good advocate and litigator, as well as you are a constitutional scholar and adviser. I would imagine you would be called into that.



Is there as much of a wall that you, as you have written about for the Solicitor General—do you see the same kind of insulation for your office, or do you have more leeway?

Mr. DELLINGER. I believe that the Office should be as independent of partisan or policy influences as the Office of Solicitor General. It has a somewhat different role, in part, when it is asked to give advice about an ongoing process, and conceivably that different role would lead the Office to formulate proposals, but where the policies are made by others, not by the Office of Legal Counsel.

The CHAIRMAN. Let me shift gears, if I can, to a couple of constitutional questions. You have written extensively about the first amendment's command that Congress shall pass no law respecting the establishment of religion. Your academic writings and congressional testimony have focused on the subject of prayer in public schools on a number of occasions.

During the 1992 term, the Supreme Court held in *Lee v. Weissman* that the establishment clause was violated when a school principal invited a religious official to offer a prayer at the school's graduation exercises. This term, on June 7, the Supreme Court refused to grant certiorari in the fifth circuit case of *Jones v. Clear Creek Independent School District*. In *Clear Creek*, the fifth circuit upheld the constitutionality of student volunteers delivering nonsectarian invocations at their graduation exercises. I am sure you are familiar with the case.

Could you briefly describe for us your view—I might show you how thorough staff is. They suggest I ask you if you are familiar with the case. If you are not, then we have got a big problem. But could you briefly describe for us your view of what the Constitution does and does not permit in the way of organized prayer in school activities?

Mr. DELLINGER. Mr. Chairman, this is an issue that I first addressed back in 1983, I believe, in perhaps some extended dialogs with Senator Hatch, who was then chair of the constitutional rights subcommittee, if I recall. My view is that the Supreme Court has in recent years come to almost invariably correct conclusions in this area.

I testified in 1983 in opposition to the administration's proposed school prayer amendment because it would have allowed Government officials, politicians and bureaucrats to compose prayers to be recited by the American people, and I suggested at that time that there could indeed be prayer in the public schools if we would apply a serious principle of nondiscrimination against religious groups; that religious groups had the same first amendment free speech right of access to public schools and other public fora as any other group.

I think the Supreme Court has this term, a decade later, come exactly to that conclusion when it held in the recent case that a religious group that wants to show a religious-oriented family values theme in the school at night has the same right of access as other community organizations to use those premises, and I think the Court has in a very positive way adopted a policy of non-discrimination against religion.

The CHAIRMAN. I acknowledge that the denial of cert in the *Clear Creek* case doesn't create a Supreme Court precedent, but it does,

however, mean that at least in the fifth circuit student volunteers may offer nonsectarian prayers at their graduation ceremonies. How do you distinguish, or do you distinguish the prayer offered in *Lee* from the prayer offered in *Clear Creek*?

Mr. DELLINGER. Mr. Chairman, I have not looked at the lower court opinions in the *Clear Creek* case, and it strikes me as almost a sort of law professor's hypothetical case. It is so close to the line of what the Court held in *Lee v. Weissman*.

As I read *Lee v. Weissman*, particularly the concurring opinion by Justice Souter, that case puts the focus on the following question. Who decides whether there will be payer. If it is a private decision, it is fine. If it is government officials who are making the decision, then it is questionable under the establishment clause.

One clear case, in my view, would be if a valedictorian, chosen because she had the highest grades, decided to use her time to pray, my view would be that she has a first amendment right to use that time to pray.

The CHAIRMAN. My time is up and I am going to submit some additional questions in writing, but let me move to the end of a series of questions I was going to try to flesh out with you here. In your view, then, if the overwhelming majority of, say, a senior class at a graduation exercise voted to have a prayer and the teachers and other school officials didn't have anything to do with that vote and didn't have anything to do with—they were not consulted and they were not involved—would the test of voluntariness be met, in your view?

Mr. DELLINGER. I am not sure I am prepared to take a position on that. I think that is a very close case. I am convinced that if—the Court, I think, may want to see that issue fleshed out a little bit more, and I am not sure how *Lee v. Weissman* would apply in those circumstances. I am quite convinced that if the decision is made by the student to have prayer—an individual student who has the podium—that that is perfectly acceptable under the Constitution.

I should add, Mr. Chairman, that the position to which I am nominated, the Office of Legal Counsel, is one where if any question arises, the proper reference is not my own views or my own writings, but what the Supreme Court of the United States has decided. I mean, our obligation will be to look to what the law is as it has been articulated by the courts, and I would inform those who work with me that the best place to look for the law is not in my encyclopedia article on school prayer or indeed in my testimony, but in the decisions of the U.S. Supreme Court.

The CHAIRMAN. Well, with the permission of my colleagues, let me conclude with one last question. Would you describe for the record your view of the permissibility of religious groups using school facilities?

Mr. DELLINGER. This is an issue on which I have had very strong feelings that it is a very simple proposition that government may not discriminate against religious speech or religious beliefs; that if facilities are open to the community, they have to be open to religious groups as well, school facilities or other public facilities.

If a school has an activity period where there can be student-initiated voluntary activities and they allow the Young Marxists to



meet, they have to allow the Fellowship of Christian Athletes to meet. Finally, a school can set up a 1-minute open forum of a moment of silence in which each person can use that moment as he or she chooses. All of those are acceptable, and indeed equal access I believe to be constitutionally required on behalf of religious groups.

The CHAIRMAN. Well, I think your view is correct. I also think it is a balanced view. I must acknowledge my view may be influenced by the fact that I was influenced by what you wrote over the years, but I mean this sincerely when I suggest that I think that freedom of religion is protected by maintaining a proper separation between religious and secular realms, but that the balanced approach you just laid out is consistent with that.

I thank you. I thank my colleagues for allowing me to go over a few minutes, and I will return with some additional questions. I now yield to my distinguished colleague from Utah, another small State in population which is happy that the Founding Fathers concluded that we should each have two Senators.

Senator HATCH. I certainly am, and we are going to keep it that way. [Laughter.]

#### OPENING STATEMENT OF SENATOR HATCH

Senator HATCH. Welcome to the committee, Professor Dellinger. I am sorry I was not here right at the beginning, but I had a conflict and had to resolve that problem. I certainly respect you and the teaching you have done through the years and the provocative opinions that you have expressed through many years, as well as many other opinions.

In your statement at the time of your nomination, you said that your obligation as head of the Office of Legal Counsel would be "to give the President the best detached, objective legal advice you can, even when it is not what he would want to hear."

Now, let us assume for the moment that you advised the President that a proposed course of conduct would be unconstitutional. What would you do—this is a hypothetical question, but what would you do if the President disregards your advice and proceeds with the type of conduct which you have firmly advised him would be unconstitutional? What position would you take? What would you do?

Mr. DELLINGER. Well, first of all, one marker for me, Senator, would be that I would not change or alter the opinion that the Office had reached because the President wanted to go ahead and do it anyway. I mean, that is one of the toughest parts of this job and I have talked to predecessors from both Republican and Democratic administrations who have admirably stood up and refused to give the imprimatur of the Office to an action they thought was unconstitutional.

Now, the Attorney General and the President have the authority to determine, especially the President under the Constitution, that he wished to take a course of action notwithstanding the opinion of an assistant attorney general, and he is free to do so. There is a point at which any action which struck me as illegal—that is, not merely questionable, but a violation of the laws—undertaken by



the administration is one that I would hope would lead me to resign the Office rather than to participate in it.

Senator HATCH. Well, thank you. That is a very principled position. You have been described by at least one commentator as "an advocate of Congressional power." Now, a lot of people like to hear that up here. Yet, the position to which you have been nominated has traditionally functioned as the primary defender of executive power. Now, how, if at all, do you expect your constitutional views to evolve to fit this particularly new role?

Mr. DELLINGER. I thought that the article that described me as an advocate of congressional power was perfectly fair, and I even called the author and informed him that saying that I was a person of good judgment and stature, but a lap dog of the Senate was not a bad thing to say about someone undergoing Senate confirmation.

Senator HATCH. It depends on how you are talking to.

Mr. DELLINGER. I do not actually believe that it is the case that I have been exclusively an advocate of congressional power. There have been a few issues such as the war powers issue with regard to the Persian Gulf war where I thought that congressional authorization was constitutionally required.

I do think it has been a tradition in the Office to guard the constitutional prerogatives of the President, and I believe that there are legitimate and independent prerogatives of the President and that those have to be defended. I indeed was concerned myself that when the party that has been the congressional party was elected to the executive branch that there would not be anyone there who would remember that there is a 200-year ongoing tradition of Presidential authority that needs to be defended, and do intend to continue to defend the legitimate authority of the President of the United States as it has evolved in our constitutional system.

Senator HATCH. Well, thank you. Can you assure me that civil servants in the Office of Legal Counsel will not face reprisals or reassignment because of political affiliation, or should I say actual or supposed political affiliation?

Mr. DELLINGER. I can absolutely assure you of that, Senator.

Senator HATCH. You raised the war powers issue. In a letter dated January 2, 1991, that you sent to Senator Kennedy, you expressed your "firm conviction that the Constitution requires the President to obtain prior expressed congressional authorization before he may order United States armed forces to make war in the Persian Gulf." In that letter, you make clear that your more general view is that it is unconstitutional for the President to send American Armed Forces to participate in hostilities abroad without congressional authorization.

Now, is it your view—and I am not trying to put you on the spot with that. I just want to review it with you. Is it your view that President Clinton's recent use of American forces to attack a Somali chieftain was unconstitutional?

Mr. DELLINGER. It is not, Senator.

Senator HATCH. Well, if it was not, when, then, can the President use military force abroad without congressional authorization?

Mr. DELLINGER. I believe that there are a number of circumstances in which the President can use military force abroad without prior congressional authorization. There are those which

are specifically listed in the war powers resolution, which is to defend an attack on American troops, to defend American bases. I think there may constitutionally be the protection of American citizens.

I think that there are uses of American troops that do not involve hostilities in the war powers sense; that is, I think the protection of humanitarian operations may well be a matter in which the President has some independent authority to engage.

Senator HATCH. But in this case, you are talking about an attack on a Somali warlord, which some might have some difficulty listing in the category of protection of humanitarian efforts.

Mr. DELLINGER. I should probably be somewhat hesitant since this is a matter that may come before the Office or the Government as it ensues. I think you have a question there as to whether, if you isolate the attack on a particular warlord, it may look like a sort of nonhumanitarian aggressive action. If you look at that as part of a larger mission of supporting humanitarian relief, it may look like a more acceptable use of Presidential authority.

I do not know, Senator, the—I am not familiar, given that I have been sort of preparing for confirmation—I am not familiar with the facts on the ground in Somalia in a way that I could actually make any comment on whether any particular use—my first answer to you was not directed toward the particular question about the warlord, but the general proposition of using United States troops to facilitate humanitarian food relief. I do think the President has that general constitutional authority, but I don't know the facts on the ground enough to make a judgment.

Senator HATCH. Well, as you can see, there are a lot of split-hair questions that are very difficult in that area. For instance, what authority does the President have to authorize the use of American troops in a U.N.-sponsored action? There are so many difficult and problematical questions there, and some would feel that helping the Kuwaitis was a matter of great humanitarian concern as well. So it isn't an easy question, or should I say not an easy set of questions.

In the same letter on the Persian Gulf war, you assert that the longstanding tradition of Presidents sending troops to participate in hostilities abroad without congressional authorization cannot be permitted to inform the meaning of the relevant constitutional provisions. Yet, in an article that you wrote on the constitutionality of the independent counsel statute, you relied heavily on "a lengthy tradition of judicial appointment of prosecutors," and you concluded by that "The judicial appointment provision passes constitutional muster."

In one of your speeches, you likewise argued that "constitutional law encompasses more than constitutional text," and said that tradition must be taken into account. It was a very interesting article. You criticized the then Attorney General—this was back in 1986—for his supposed inconsistency on this issue.

Can you explain your own seeming inconsistency on the role that tradition may properly play in constitutional interpretation?

Mr. DELLINGER. The starting point in analyzing any constitutional issue is the text of the Constitution, and I believe the text should be read as it was originally understood and intended to be

read by those who authored it, and that is baseline from which we begin constitutional analysis.

It is the case in many areas that—in many areas of the law, it is the case that we also have an evolving 200-year tradition; that is, I do believe with respect to the powers of the President of the United States that if you are representing the United States in court or delivering an opinion, you look not only to the conception of the Presidency in 1787, but it is part of the argument what has transpired over 200 years as Washington, and then Jefferson, both Roosevelts, have made assertions of Presidential authority, and that those have come to be accepted as valid. That is a valid part of the constitutional tradition.

It is always difficult to decide at what point a constitutional action by decisionmakers overrides what may be a more limited view of the original understanding, and if I recall the January letter, it was my view that a relatively few small uses of Presidential authority in a warmaking way did not add up to a repeal of the declaration of war clause with respect to the sending of 500,000 American troops overseas; that there was not—that the mere fact that some President said it was not enough in that instance.

Senator HATCH. Well, one might argue that why not use tradition, you know, with regard to justifying certain war powers because there are some pretty flagrant traditions out there with regard to the use of the war power.

I have probably used up my 10 minutes. I notice that the lights were not on, so let me relinquish the questioning at this time and I will come back later.

The CHAIRMAN. Senator Metzenbaum.

#### OPENING STATEMENT OF SENATOR METZENBAUM

Senator METZENBAUM. Thank you, Mr. Chairman. Mr. Dellinger, we are happy to welcome you here and we commend the President upon his nomination of you. You have a very distinguished record. I don't have a lot of questions. I have one.

As you know, many of us who are outspoken advocates and defenders of a woman's constitutional right to choose get tagged as being pro-abortion or antifamily. Those labels, which I think are unfair, ignore the fact that the freedom to choose involves a range of health, legal, social, and economic issues for women and their families. Being pro-choice also means supporting policies that enable women to avoid abortions through contraception and adoption, as well as greater access to maternal and child health care.

You were cochairman of the National Commission on America Without Roe, which was set up to examine the serious consequences that overturning *Roe v. Wade* would have for our society. The commission included national leaders in many fields and Members of Congress from both parties. Last year, the commission issued a report after a 6-month study of how the loss of the fundamental right to choose would affect our Nation's medical, educational, political, public health, and economic institutions.

Can you describe for us your role as cochairman of the commission and tell us your views, as well, with respect to the report's findings?



Mr. DELLINGER. Senator, I was the cochair of the commission along with Dr. Joyce Lashoff, who had been dean of the School of Public Health at the University of California and was president of the American Public Health Association. The commission was charged with first considering the consequences that would ensue if *Roe v. Wade* were overruled and reproductive freedom were severely curtailed, but, second, to propose a more positive vision of family and reproductive health for the country.

Its members included business leaders like Robert McNamara; scientists like Carl Sagan; Leon Letterman, a Nobel laureate in physics; Dr. Nada Stotlin of the University of Chicago Medical Center; Dr. Ann Wence, who is chair of reproductive endocrinology at Northwestern Medical Center.

Our conclusion was that the national goal ought to be to make abortion safe and legal, but rare. I think it was the commission report that made that view of the problem central; that it should be seen as America's goal should be to reduce the need for abortion in this country by education and responsible behavior, by research into contraceptive development, by birth control availability, and moreover that we should take a very positive stance toward bringing about healthy pregnancies, healthy child-bearing, and healthy children, and that this should all be seen as a more positive vision where our resources ought to be put to see that women and their families have the real capacity to make real choices, including the choice of safe and effective contraception and the ability to have healthy pregnancies and healthy young children.

Senator METZENBAUM. Thank you very much. Mr. Chairman, I have no further questions.

The CHAIRMAN. Thank you very much.

Senator Thurmond.

#### OPENING STATEMENT OF SENATOR THURMOND

Senator THURMOND. Thank you, Mr. Chairman. We are glad to have you with us, Professor Dellinger.

Mr. DELLINGER. Thank you, Senator.

Senator THURMOND. Concerning *Roe v. Wade*, do you believe that the Supreme Court could have reached the same conclusion on grounds of equal protection as they did by finding the right of privacy emanating from the Constitution?

Mr. DELLINGER. I do, Senator, yes.

Senator THURMOND. Professor Dellinger, the Supreme Court ruling in *Missouri v. Jenkins* gave district courts the broad authority to raise taxes or increase taxes as part of a judicial remedy. It is my belief that the legislative branch is the sole governmental body to raise taxes, whether it is a city council or a State legislature or the Congress. Some of us Senators have introduced a bill to reverse that decision. I was just wondering how you felt.

Mr. DELLINGER. Well, I certainly agree that the decision to tax is a decision that ought regularly to be made by the direct representatives of the people. I mean, that is a longstanding and very deep tradition from the founding of this country, the right to have an elective role in determining taxation, and the resistance of taxation by the British Crown was an important principle.

There are very few and limited circumstances in which a court ought to ever order a remedy that would require the raising of taxation. It would only be in instances—I think, as Solicitor General Drew Days testified, only where the court was carrying out a remedy of a clear constitutional violation and that involved some expenditure of funds might that indirectly be an effect. But I do think there should be a considerable restraint on any judicial remedy involving taxation because that is a very complex subject that ought to be left to State and local officials, and particularly those in the legislative branch.

Senator THURMOND. Under our tripartite system, the Congress makes the law, the Executive enforces the law, and Judicial merely interprets the law. It is the opinion of a number of us Senators that the judiciary does not have the right to impose taxes. Otherwise, they are performing a dual function.

Mr. DELLINGER. I think that you correctly state the basic proposition that matters as intrusive as taxation are legislative matters.

Senator THURMOND. Now, do you believe that a statute withholding this authority to Federal judges could withstand constitutional scrutiny? As I said, some of us have introduced a bill which would affect only the remedial jurisdiction of the lower Federal courts to prohibit them from ordering new taxes or tax increases as part of a judicial remedy. It does not affect their jurisdiction with regard to the type of case they may hear.

Some have argued that a constitutional amendment is necessary to overturn the *Jenkins* decision. However, it is felt that a statute would be sufficient. I was just wondering if you had an opinion on this.

Mr. DELLINGER. I do not, Senator, without having a chance to study the particular legislation. I do think that Congress has significant authority to revise the remedies that are available in Federal courts, but whether any particular statute is constitutional is something that I would have to study the particular statute.

Senator THURMOND. Professor Dellinger, there is a good chance that the Congress will this year adopt a proposed constitutional amendment mandating a balanced Federal budget. If you recall, we did that several years ago in the Senate and the House killed it, but there is a good chance this year of adopting it again. If it goes to the House, we think that they have a chance of passing it there.

If such an amendment becomes part of the Constitution, who, in your opinion, would have standing to enforce this amendment?

Mr. DELLINGER. My answers would be tentative on that question, Senator, but I can imagine—and I believe that I testified before the Senate Budget Committee that I could contemplate several ways in which issues under the amendment might come into litigation. One would be that if the amendment were law and the budget was out of balance and the President took steps to bring it into balance in order to comply with the amendment by cutting a particular program, persons who were entitled to be recipients under that program and whose benefits had been cut to comply with the constitutional amendment might then have some standing to challenge the action of the President under the amendment.

The amendment itself, of course, would be—if it had been properly ratified, would be part of the Constitution and in itself would

be beyond challenge, but its implementation might be challenged in litigation by beneficiaries of government programs. I would not contemplate that taxpayers would have the right to bring litigation under it, but I would have to see a particular case and think about it in a particular instance before I could be sure about that.

Senator THURMOND. Do you feel Members of Congress would have the authority to do that?

Mr. DELLINGER. Senator, I do not know, I do not know. The courts have allowed Members of Congress standing in some cases. I have not always been persuaded that congressional standing made sense in all instances.

Senator THURMOND. I was just wondering who you felt would have the standing to do it.

Mr. DELLINGER. Possibly, beneficiaries.

Senator THURMOND. You mentioned the President. Is there anybody else, do you think?

Mr. DELLINGER. It is difficult to imagine who the plaintiffs would be until we knew what kind of issue had arisen under the amendment.

Senator THURMOND. Professor Dellinger, I understand that in 1989 in the *Webster* abortion case that you, along with others, signed a brief, several dozen professors. According to the brief, some of the signatories believed that the States do not possess a compelling State interest justifying abortion regulations even after the point that an unborn child attains viability. Would you care to explain that?

Mr. DELLINGER. Senator, I do not recall—this would not have been a brief that I wrote. I may have been a signatory, but that is not my view. I believe that the court has been clear that—the Supreme Court decisions have been clear that a State does have a compelling interest in protecting the potential life of a viable fetus.

Senator THURMOND. Some of the recent decisions do hold that now, don't they?

Mr. DELLINGER. I am sorry, Senator?

Senator THURMOND. Some of the recent decisions of the Supreme Court do hold that the States have the power to make some regulations?

Mr. DELLINGER. Yes, they do.

Senator THURMOND. We don't want to take any more rights from the States. The States, when the Constitution was written, really were to be the dominant bodies of the Government. This Federal Government was to be a government of limited powers. The States could do anything not prohibited by the Constitution. The Federal Government could do only those things where it had specific authority. Of course, you know the 9th and 10th amendments explain themselves. You believe in the 10th amendment, don't you?

Mr. DELLINGER. Yes, I do, Senator. I do, indeed.

Senator THURMOND. That is all. Thank you very much.

The CHAIRMAN. Senator, do you believe in the ninth amendment? [Laughter.]

Senator Grassley.



## OPENING STATEMENT OF SENATOR GRASSLEY

Senator GRASSLEY. Congratulations on your appointment. I would like to discuss some issues with you. First, and most important to me, is the very important role that you might play in determining the new administration's activities in regard to the false claims legislation, or qui tam legislation.

You probably know about this law, but just let me give a little bit of background. Qui tam legislation allows a citizen to bring a case to court if he or she feels there is fraudulent use of taxpayers money. The law was passed during the Abraham Lincoln administration. We strengthened it in 1986, and there has been \$500 million recovered just in the last 3 years. In fact, in December there was one case of \$110 million.

I have discussed this with a lot of people that you will work with and I am satisfied that your boss, Attorney General Reno, is doing a lot to review this and deal with some problems that we had with the previous administration. I felt two things. One, at the political level there was some opposition to it that prepared the full implementation of it, at least full use of it. And then maybe even at the professional level within the Department, there was some concern about it. I hope that those concerns can be overcome.

Since you have stated in your constitutional writings that constitutional interpretation should reflect history, precedent and tradition, as well as text, is it relevant to your analysis of the constitutionality of qui tam that the first Congress enacted qui tam statutes and that the particular qui tam provisions at issue today were enacted in 1863?

Mr. DELLINGER. I think it is very relevant.

Senator GRASSLEY. Does qui tam violate the appointments clause of article II because it allows litigation to be conducted on behalf of the Government by someone other than an executive branch official?

Mr. DELLINGER. Senator, I probably should not give a final answer because the matter may still be under review in the Department, but let me say that generally I believe that we should accord a great deal of weight to previous positions taken by the Office of Legal Counsel, but there are some instances where there are counter-arguments.

For example, the position of the Office of Legal Counsel that that was an appointments clause violation has never been accepted by the rest of the Department, so that in that sense I think it may be seen as something that never became solid and established as a Department of Justice provision. The Solicitor General's Office, I believe, never acquiesced in that interpretation, and that may be also a relevant factor in the event of a review of that question.

Senator GRASSLEY. Do qui tam actions violate article III standing requirements because the relator does not have an injury, in fact?

Mr. DELLINGER. Again, I would not want to give a final answer in case this is still under consideration in the Department. My facts are not clear, but my own view—I may have been one of the few people who actually looked at this question before becoming a nominee. I just had occasion to share articles with a professor who had written on this.

My general approach would be to assume that if you offer a reward to someone who successfully brings an action that you have clearly created a stake in the outcome as a general proposition. I mean, I would stop short of applying that to *qui tam*, but it certainly makes sense to me that there is a real benefit to be obtained in that instance.

Senator GRASSLEY. And lastly on this question of *qui tam*, does a *qui tam* action violate the separation of powers by interfering with the Executive power to enforce the law?

Mr. DELLINGER. Senator, again, I would not want to have a final answer on that, and that may be an area where the Department of Justice needs to make sure that its institutional interests are protected of being in charge of litigation. There may be areas that need to be worked out there that are beyond my present knowledge, though I would think those are problems that ought to be soluble. But the Department's litigating authority and independence needs to be protected itself to some extent so that you do not have different litigators stepping on each other's cases. That may require some work, but I think that that inquiry is going on in good faith.

Senator GRASSLEY. As a nonlawyer, I am not in a position to argue any legal points with you, but as just a matter of public policy, it seems to me that we have over 300 cases pending that have been pursued to some extent or other under this. The vast amount of money that is brought in, plus the incentive to expose a lot more fraudulent activity in the future—just the history of its use for a short period of time—ought to dictate as a matter of sound fiscal policy and sound personnel policy that we ought to do what we can to make sure that it is not only used, but encourage the use of it.

For us in the Senate, it is particularly bothersome—again, not this administration, but the previous administration, that they would not speak to the point of constitutionality in the four or five cases where it has been raised and upheld in every instance I might add. Our Senate counsel had to argue in support of the constitutionality. So we think that your Department's backing of it obviously gives much more weight to the constitutionality of it than our own Senate counsel, as outstanding as his case arguments were.

I would like to ask your opinion about the speech and debate clause and the separation of powers. My colleagues have used these two constitutional doctrines to argue against Congress falling within the provisions of a whole host of laws that Congress has exempted itself from, and I have been in the leadership of trying to get these laws applicable to Congress, as we did in the last civil rights law, as an example, and not only myself, but with Senator Mitchell's help.

What is your view regarding separation of powers and the speech and debate clause, particularly whether or not the doctrines preclude congressional coverage?

Mr. DELLINGER. Senator, that is something I think would have to be resolved, you know, on a case-by-case basis with regard to each statute. The speech and debate clause is obviously an important protection of legislative independence, but, as important as it is, is not a part of the Constitution with which I am very familiar

in terms of the cases, so that I have not previously addressed the question of whether there are speech and debate clause problems with that application to Congress.

Senator GRASSLEY. Would it be appropriate for me to ask before your name comes before the Senate if maybe you could give us a written answer?

Mr. DELLINGER. Sure; I would be happy to.

[See Questions and Answers following this hearing.]

Senator GRASSLEY. In 1992, your Agency—obviously, you weren't head of it then—published an opinion that the Madison amendment, which is the 27th amendment, had been ratified, although it had been proposed 200 years ago. You have written that the amendment was dead. Do you now concur in the OLC opinion, and do you believe that the 27th amendment has been ratified?

Mr. DELLINGER. Senator, my own personal view is that it was dead, and I have not changed that view. I wrote that in an article in the Harvard Law Review in about 1980 that said that the amendments proposed by the first Congress over 200 years ago at some point lapsed and became a dead letter. I mean, my proposal was that Congress should re-propose that amendment which, as a matter of policy, I favored that an intervening election should occur before salaries are raised or lowered, and that it would be speedily ratified by the States and then we wouldn't have any doubt that it was a valid part of the Constitution.

It is interesting, though, that you raise this because the fact that I took the view that it was dead, in my view, does not suggest that the Office of Legal Counsel should change its position on the question; that is, my view is just one source of addressing this. I think there is respect for the prior decision made by the Office of Legal Counsel. There is the fact that a number of other constitutional scholars felt that this amendment did meet all the formal requirements and was valid, and I don't see any reason for the Office of Legal Counsel to change its position on that question merely because I wrote an op ed or a letter to the editor or something taking a different view. Our job is not to put my views into law, but to look and ascertain across the board what the best judgment is.

Senator GRASSLEY. Well, on a new aspect of it, can an automatic cost-of-living adjustment take place under the Madison amendment?

Mr. DELLINGER. I have expressed an opinion on that and so I have to address it. I thought one of the ironies of the adoption of the Madison amendment was that it locked in the congressional pay increase—I don't think there is any question about that—the one that was in place, because the amendment says that there shall be no—I don't have it before me—no alteration in compensation, no change, until an election has intervened, and that meant up or down. It was not a slip of the pen because as I looked at the discussions in the first Congress that proposed this amendment, they were quite clear that one of the evils, they thought, would be the evil of members lowering the salaries too much so that yeomen and farmers couldn't afford to come and be in Congress. So they quite clearly meant what it says that you may not—the word is “vary” the compensation. Compensation may not be varied, so if there is a bill that has a cost-of-living increase in it that is part



of the law, I don't think you can roll that back. It has to take effect, and that was how I publicly interpreted the amendment at the time this question was raised.

Senator GRASSLEY. Mr. Chairman, I yield the floor. Do we have permission to submit questions, in addition to the one that I have already mentioned, for answer in writing?

The CHAIRMAN. Yes, Senator. I would hope, though, you could submit them before the day is closed.

Senator GRASSLEY. We can.

The CHAIRMAN. Good; then there is no problem.

[See Questions and Answers following this hearing.]

The CHAIRMAN. I yield now to the Senator from Utah, Senator Hatch.

Senator HATCH. Thank you, Mr. Chairman. As you know, Professor Dellinger, I have watched you through the years, have read a lot of your writings. You are a very bright law professor, somebody I have a great deal of respect for. So it is an opportunity for me to explore some of these things, and I hope you don't mind, because you are taking over a very, very important position down there at the Department of Justice and I think you are capable of doing so, very capable.

In your *Planned Parenthood v. Casey* brief, as I recall it, you took the position, as I understand it, that a vastly different rule of stare decisis operates for precedent that creates a new right, on the one hand, and precedent that declines to create a new right on the other, at least if I read it correctly.

Specifically, you seem to hold the view that precedent, no matter how incorrect, that created a new right should rarely, if ever, be overturned, while precedent that declines to create a new right should be overturned if wrong. Now, do you think I have fairly summarized your opinion there?

Mr. DELLINGER. Senator, I don't know. I have not reread the *Casey* brief. I did it in conjunction with Lloyd Cutler and Michael Small.

Senator HATCH. Having expressed it that way, do you take that position?

Mr. DELLINGER. So I can't be certain that—I mean, I know that you are attempting to fairly characterize it. I just can't be sure as to what the position was.

Senator HATCH. You can see why I am concerned because I am concerned that this asymmetry in your analysis—

Mr. DELLINGER. It sounds like a one-way ratchet that only a certain kind of decision gets stare decisis respect as compared to another kind of decision.

Senator HATCH. Sure.

Mr. DELLINGER. And I can understand why that standing alone would be a cause for concern.

Senator HATCH. Well, it looks like it is inherently biased toward liberal rights rather than—

Mr. DELLINGER. It does sound that way, and I hope that—I was not expressing myself well if that is what I stated because that sounds like an awfully—it sounds like it could be criticized as a one-way ratchet.

Senator HATCH. Even more than liberal rights, it seems to be racheting a one-way approach toward liberal results and ignoring the other side.

Mr. DELLINGER. Yes; I can understand a concern, and I would hope that the brief we filed was somewhat more nuanced. I must say that I believe that the last time I looked carefully at the brief, in this context I feel obliged to say that I took some pleasure in the fact that I believe that the position taken by Justices O'Connor, Souter, and Kennedy in their joint opinion on *stare decisis* very closely tracks the argument that Mr. Cutler and Mr. Small and I had made in our brief on behalf of certain Members of the House and Senate.

I think if you put that brief down beside—or that was my reading of *Casey*. If you put our brief alongside of *Casey*, the O'Connor-Kennedy-Souter opinion comes very close in its statement of *stare decisis* and the question of giving some deference to settled expectations that have built up around a right that makes me think that the brief must have been fairly sound because I certainly thought of the joint opinion as a very sound analysis of *stare decisis*.

Senator HATCH. Well, that is very interesting. Let us accept for a moment that that type of asymmetry is valid that creates rights or new rights—well, let me put it this way. If erroneous decisions creating new rights are to be frozen into permanent existence, whether they are right or wrong, or the rationale is right or wrong, shouldn't it also be incumbent upon a Justice to resolve all doubts against the creation of new rights?

I mean, it seems to me that otherwise, if you don't do that, you have a one-way ratchet, which you have described it as, under which government by judiciary completely replaces government by the people.

Mr. DELLINGER. That would certainly be an argument against the proposition which I certainly would not share that an erroneous decision creating new rights should be frozen into the law.

Senator HATCH. Well, I am glad to hear that.

Mr. DELLINGER. I mean, Justice Powell, I think, stated it very well when he said that this kind of adjudication calls for the exercise of caution and restraint on the part of the courts when they are building on a tradition, and that is where I would—I do think that caution is there, and the existence of any doctrine of *stare decisis* ought to make one cautious about the extension and application of the law, that you are resolving more than the case before you. You are indeed influencing the future, and that ought to give pause to any adjudicator.

Senator HATCH. I just thought that was interesting in the brief and I just wanted to ask you because it is something that intrigued me.

In 1987, as I recall, OLC, the Office of Legal Counsel, rendered an opinion that the Federal Government could design a voucher program under which parents could redeem their vouchers at religious as well as secular private elementary and high schools. Now, you yourself have espoused a "neutrality" test for the establishment clause in which, in your words, the "key factor is the dispositive role of private citizen choice."

Now, given that dispositive role, to use your language, that private citizen choice plays in the allocation of funds under a voucher system, would you agree that a voucher system that includes both religious and secular private elementary and high schools would properly be ruled constitutional?

Mr. DELLINGER. I think that the decisions of the Supreme Court are in some tension on this question at the moment. As you may recall, the Court held in an opinion, I believe, by Justice Brennan that, if I also recall, was a 5-to-4 opinion—the Court struck down a program whereby special supplemental teachers for low-income children were provided to parochial as well as public school students, and some commentators, I have noticed, have at least raised the question of whether that is still—how you reconcile that with the more recent decisions that place such a strong emphasis on nondiscrimination, but I think there is some tension in the Court's holdings in this area.

Senator HATCH. Let me just move to another subject. Professor Dellinger, as you know, the Supreme Court, through a process of so-called selective incorporation, has applied most, if not all, of the provision of the Bill of Rights against the States. Thus, for instance, the first amendment, which originally was intended to apply only to the Federal Government, has been applied to restrict the States. But the second amendment, which protects the rights of law-abiding citizens to own firearms in this country, is not.

Now, do you believe that the second amendment ought to or not ought to be applied to the States?

Mr. DELLINGER. Senator, that is a question that I have never addressed or thought about. I would have to reflect on that question.

Senator HATCH. Why, if most of the other Bill of Rights—if they apply to the States, why shouldn't the second amendment? In other words, on what principled basis can we suggest that it is appropriate to apply almost all of the other provisions of the Bill of Rights against the States, but not the second amendment? That is a matter that is going to become more and more provocative and difficult through the years because these second amendments really, in my opinion, are very valued on the part of people throughout the country.

Let me move to another subject, though, that is going to become one—it is already one of the most important subjects in constitutional law, but is going to become even more important as we continue to be concerned about our environment. I believe that one of the most important civil rights in this country is the right to enjoy one's property without confiscatory regulation.

For instance, in my own home State of Utah, overzealous Federal regulators have made life miserable for ordinary landowners. Last year, the Supreme Court, for instance, in the *Lucas* case held that that may not be a valid approach, or at least gave some indications. It held basically that regulatory "takings" that result in a total diminution in market value of a piece of property are, again, "takings" requiring just compensation for purposes of the fifth amendment and its takings clause. It was an interesting case. It wasn't very broad, it only went so far, but I thought it was an interesting step.

Do you believe that *Lucas* was correctly decided?



Mr. DELLINGER. I do, I do. If I could say just one more word about that, the takings clause is an important part of the Constitution. James Wilson of Pennsylvania, in fact, who was one of the leaders at the Constitutional Convention, told the Pennsylvania ratifying Convention that an amendment to that effect would be a very important safeguard that ought to be added to the Constitution, and it has been a very interesting area of development.

As you know, the Court has taken very small steps in this regard and decided in *Lucas*, a case that may not come up again because it is rare that there will be a total, 100 percent, no value left at all diminution of a piece of property by regulation when the Government hasn't taken it—but I was persuaded by the majority opinion in *Lucas* that this case certainly met the test of an effective taking.

Senator HATCH. A lot of us were a little disappointed that it was construed so narrowly in that particular opinion.

Mr. DELLINGER. But, you know, we do have a tradition that the Court should not decide unnecessarily broad constitutional questions, and that tradition applies in the takings area as well.

Senator HATCH. There you go advocating judicial restraint.

Mr. DELLINGER. Judicial restraint.

Senator HATCH. I will tell you, I am really impressed by that.

Let me just go a little bit further, though, on this. Do you think that a regulatory taking that results in less than a complete diminution in the market value of a piece of property could be a taking requiring just compensation under the purposes of the fifth amendment.

Mr. DELLINGER. Senator, I don't know beyond that. Beyond reading *Lucas*, I haven't dealt extensively in this area and I sort of wait to see where the Court is going to go the way everyone else does. I mean, this is truly an open question.

Senator HATCH. I think, Walter, what I am trying to do here today is to get you to give a little thought to our Western States.

Mr. DELLINGER. I will. I am happy to do that.

Senator HATCH. If they find a puddle on the ground in Utah—

Mr. DELLINGER. Is it a wetland?

Senator HATCH. It is a wetland, and it becomes a taking, really, in my opinion, of property rights that our farmers and others are really getting very upset about, so it is important that I bring this matter to your attention.

In another area, on unenumerated rights, this is a very important area as far as I am concerned, and really not too well understood by many in our society. Do you agree with the Court's decision in *Bowers v. Hardwick*; that is, that State laws prohibiting homosexual conduct between consenting adults do not violate due process, regardless of whether the Court feels that such laws are wise?

In other words, in your own best legal opinion, did the Court get it right or did it get it wrong in *Bowers v. Hardwick*? It is a tough case and it is a 5-to-4 decision, a very close problem.

Mr. DELLINGER. A two-part answer. Let me reemphasize again that I enjoy our dialog so much I lose sight of the fact that the role of the Office of Legal Counsel is to apply the law that is out there.

Senator HATCH. That is right.

Mr. DELLINGER. And that is something I will not forget in the Office, so that the majority opinion in *Bowers v. Hardwick* is where the Office will look for guidance in applying any issue in this area. That is the law and that is the Court's position.

The CHAIRMAN. If I could interrupt for a minute, I also suggest that if the President ever saw fit to follow my recommendation or others' and nominate you for the Supreme Court, what you say here will be part of the record.

Senator HATCH. It is a tough issue because, as you know, wasn't it White who wrote the opinion?

Mr. DELLINGER. Yes.

Senator HATCH. And we are going to replace White. We don't know where that is going to go in the future, so it is an interesting question. It is one that I think is worthwhile answering.

One criticism of judicially created rights, like privacy, gets the Office of Legal Counsel into all kinds of issues like this, and you are going to have to advise them. So, you know, I am interested in just how you intend to operate the Office with regard to an issue like that when you know that the person who wrote that particular decision is no longer going to be on the Court and will be replaced by another person, hopefully Judge Ginsburg. So you are still going to be advising on briefs and what is done, so your position is very important. Do you have a position on it?

Mr. DELLINGER. I was more persuaded in that case by Justice Stevens' opinion that I thought was the most persuasive in *Bowers*.

Senator HATCH. All right. One criticism of judicially invented rights like "privacy," in the eyes of a lot of people, is the inability in any principled fashion to determine what the boundaries are. In other words, once you create an unenumerated broad-based right called "privacy," that really has no further elucidation in the Constitution, then what are the boundaries? Where do you set them? In other words, whether or not such a right will be recognized in a particular context depends upon the predilection of the judge deciding the case.

Some of the most vocal supporters of the so-called "right of privacy" in the context of abortion would be the first to object if the Supreme Court employed the same methodology looking outside the text of the Constitution to protect economic rights to cut back on, say, the liberal welfare state of the Federal Government, or even State governments for that matter.

Now, one can still be pro-choice as a matter of policy and support legislation like the Freedom of Choice Act and still recognize the illegitimacy of judges making up rights that are not found anywhere in the Constitution. You agree with that, I suppose?

Mr. DELLINGER. Yes.

Senator HATCH. In your view, does the constitutional right to privacy encompass the following activities, or should it encompass these activities, and if not, why not? Now, again, I am not trying to give you a rough time. I just want to point out here in this hearing that these are important issues and they arise every day. These are gut issues in our society, and just what are the boundaries of this so-called unenumerated right of privacy? Every time we get into a Supreme Court nomination, every time we get into a major

issue on this over at the Justice Department, you have a wide variety of beliefs on just what the boundaries curtail or encompass.

What about prostitution?

Mr. DELLINGER. I think, Senator, that in this area one central question in each case is whether there is a valid governmental objective, and I think that I have no doubt in my mind that government has a valid objective in suppressing commercialized sex, that those laws are perfectly constitutional.

Senator HATCH. What about marijuana use in one's own home?

Mr. DELLINGER. I think that is a matter for State legislatures to resolve, would be my inclination.

Senator HATCH. So, if State legislators decide, like *Bowers v. Hardwick*, that it should be prohibited and that it should be subject to criminal penalties, then it can be?

Mr. DELLINGER. Let me say as a general proposition that Justice Harlan in his concurring opinion in *Poe v. Ullman*, which later became his opinion by reference in *Griswold v. Connecticut*, said that in this area there is simply no substitute for the exercise of reasoned judgment. I mean, I think that has been a tradition that continues through Justice Powell, who said that the articulation of these rights must be done with caution and restraint, but the Court should not abandon its responsibility.

I think there has emerged now on the Supreme Court, through the opinion of Justices O'Connor, Souter, and Kennedy in *Casey*, a sense that there should be a careful elaboration of reasoned judgment, that there are not any magical bright lines.

Senator HATCH. If the State does a careful elaboration of the reasons behind its prohibition or its restriction, then that is good enough?

Mr. DELLINGER. That is correct.

Senator HATCH. What about physician-assisted suicide? Now, for those who are watching this throughout the country, what I am trying to point out is that you can talk about unenumerated rights, and especially this "right of privacy" and all the penumbras involved in that, but it gets down to some pretty serious issues. Some here would think that this "right of privacy" just encompasses everything. Well, it doesn't.

But whenever you invent a new right under the Constitution, which many feel this unenumerated right has become to establish some social principle—abortion, in this case, or the issue in *Griswold* on the right of contraceptives—when you do that, you may be going beyond the constraints of the Constitution itself.

But let us take doctor-assisted suicide. That is a big issue in this country today. Do the States have the right to curtail that unenumerated right for a doctor assist in suicide?

Mr. DELLINGER. Senator, that is not an issue on which I have formed an opinion. I can tell you that I think one aspect of a court's resolving that would be to listen very carefully to the State's reasons for its prohibition.

Senator HATCH. But if a State can show logical or reasonable reasons within the rule of reason for preventing doctor-assisted suicide, then the State ought to be able to do so?

Mr. DELLINGER. I think if the State shows a sufficient interest, yes, and there may well be—and one reason I think it is difficult



to sort of resolve these questions briefly is that there may well be legitimate State interests that I haven't thought of at this moment that good briefing by the State, reflections by its State legislature, would show.

Senator HATCH. So you are saying the States have some leeway here?

Mr. DELLINGER. Right; if the States come up with—they may show that there is a possibility of overreaching, that there are possibilities of undue influence, that outside a regularized setting there are numerous problems that I haven't thought of, and I often find that sometimes when I say to myself, well, surely a State couldn't do that, that I then read a brief and see that the State has very good reasons, indeed, that it has put forward for carrying out a given program. So, that, in a sense, is why you need to look at a particular individual case to make a judgment.

Senator HATCH. But you seem to be coming down on the side that if the State can give legitimate justification for the restraint that the so-called right of privacy can be curtailed.

Mr. DELLINGER. That is close to being an accurate statement of my views.

Senator HATCH. Well, make it more accurate.

Mr. DELLINGER. My two-sentence version of constitutional law—if I ever held a very short course that only consisted of two sentences, it would be this.

Senator HATCH. Well, I will be interested in this.

Mr. DELLINGER. Proposition 1 would be that before the Government may interfere with a citizen's liberty, the Government must have a reason. It is a very simple statement.

Senator HATCH. A legitimate reason.

Mr. DELLINGER. It is a very simple statement, but it is the basis of Western constitutionalism that we are not a country in which the Government can say to its citizens, just because I said so, that is why. The Government actually has to have a reason.

Now, second, in the last 60 years we have 6 decades of tradition where the Court has very cautiously determined that there are some liberties that are so fundamental, such as the right of procreation in *Skinner v. Oklahoma*, that the State needs a very good reason indeed for interfering with that fundamental liberty, that an ordinary reason simply isn't enough if what is involved is something as absolutely fundamental as maintaining one's procreative capacity. You know, a mere plausible reason isn't enough where the liberty is of great and fundamental importance. Now, the identification of such interest is something, again, which should be done with caution and restraint, as Justice Powell and Justice Harlan have noted.

Senator HATCH. Well, that is interesting, but isn't the rub, though, on who decides what is a legitimate State objective? Is it going to be nine unelected judges or is it going to be the legislative elected people who have to stand for reelection to justify their opinions? That is where the debate comes in.

I don't want to prolong this, but as you can see, just in this little discussion here, it isn't as simple as people make it in the demagogic comments on both sides, by the way, on some of these issues. For instance, does the State have the right to prevent euthanasia?

Does the State have the right to prevent incest between consenting adults in the privacy of a home? Does the State have a right to prohibit somebody from having any kind of pornography within the confines of one's home? Does the State have the right to prohibit homosexual marriages? Does the State have the right to have anti-adultery laws? Does the State have the right to prevent infanticide of newborn children with birth defects? That comes into hospital determinations, as you know—Baby Doe.

These are important issues that sometimes—those who are always arguing for this “unenumerated right” of “privacy” don’t seem to take into account. How about sexual activity between consenting children and adults? You could just go on and on to show that whenever you start allowing unelected judges to make these very serious determinations and take it away from elected representatives who have to stand for reelection, you then have rule by the courts rather than by a separated powers doctrine that our country believes in.

So I use these examples not to offer my own views on whether or not they should be protected conduct. Some of those clearly I might or might not protect, but it is my view that protection for such conduct has to come, if at all, from legislatures and not the courts, although that view is strongly debated here in the committee.

The point is that under the amorphous constitutional right of privacy, whether or not that conduct is protected depends not on any neutral principle of adjudication, but rather on the subjective predilection of judges deciding the case. That bothers me a lot because that is what is happening. This is not the rule of law; it is government by judiciary. So, that is the reason I have raised these issues, and I am happy to see that you see the difficulties of these issues. It is one thing to teach constitutional law; it is another thing to have to live with the laws that are imposed by judges who have really no right to impose—maybe “right” isn’t the word—who really have no reason to impose them.

The CHAIRMAN. If the Senator will yield for just a second?

Senator HATCH. Sure.

The CHAIRMAN. I would point out that there are a number of those rights to privacy, those rights that are considered basic, that the Constitution does not enumerate. For example, the State of Virginia decided black folks can’t marry white folks, you know, and the Court came along in *Loving* and said, “hey, wait a minute, marriage is a pretty basic thing.”

Senator HATCH. That is right.

The CHAIRMAN. Black folks should be able to marry white folks, and oriental folks, black folks, and so on and so forth. The Government has no darned business telling you who you can marry. They also came along and said, by the way, if married couples want to use contraceptives and don’t want to have a child, or want to choose to have one now or not want to choose to have one—they also came along and said, you know, a State in the Midwest can’t in the middle of a war decide kids can’t learn German, or can’t learn a foreign language.

So the Senator is correct that this is a very difficult area, but I would make a distinction. The Senator keeps pointing out rights

not guaranteed by the Constitution. There is a difference between rights not being guaranteed and rights not being enumerated. There are a number of rights, like the one I just mentioned, that are not enumerated, but are guaranteed.

So the point that I would like to make, not speaking for the witness, who can speak for himself—but I just want to make sure for the folks who are listening to this that in this whole area of “unenumerated rights” you either adopt the view that there are unenumerated rights, and it is a tough call, and you rely upon the language of the Justice quoted by our witness suggesting that reasoned judgment be the measure—and I might add there are a number of criteria over 60 years, actual yardsticks, that have been built to determine whether or not a right is enumerated and, if unenumerated, whether or not it should be recognized as a right. It is not some willy-nilly notion that we just go out there and say this is the way it is going to be.

The last point I would like to make is that this reasoned judgment has served us fairly well. The Court has not gotten very far out ahead of society ever on these matters. As far as our elected officials making the law and determining what should be constitutionally guaranteed and should not be, the elected officials who stood for reelection in the State of Virginia and other States in the past concluded that black folks shouldn’t marry white folks. That is outrageous, but they concluded that, and they concluded it year in and year out and year in and year out. The Court came long and said, wrong, you can’t do that.

So this is a tough call, but I would make the point just for the record that these are not finding rights in the Constitution. These are recognizing rights that exist in the Constitution that are not enumerated. It will be a tough call, it will continue to be a tough call, and I am sure the Senator is not suggesting the alternative should be adopted, which is if it isn’t mentioned, it doesn’t exist. If it is not mentioned in the Constitution, if it is not enumerated, then it doesn’t exist. I can’t imagine the Senator adopting that view either.

So we are somewhere between things that aren’t mentioned are constitutionally protected and not everything that is not mentioned is constitutionally protected. That is a tough call and that is what we have judges for.

Senator HATCH. But I would, of course, hasten to point out that in the case of miscegenation statutes it was decided on the principle of equal protection.

The CHAIRMAN. I was speaking to your larger point—

Senator HATCH. It was decided correctly that under the Constitution there is no right to treat people disproportionately or unequally. Frankly, that is a little bit different from what I call substantive, and what most constitutional scholars call substantive due process, the Court just going off on its own and creating rights that aren’t there and literally making the determinations for the lawmakers of our society who are elected to make the laws.

The CHAIRMAN. I was speaking more broadly to your point about enumerated and unenumerated rights.

Mr. DELLINGER. I wish I could get the two of you to come down and teach my constitutional law class for me.



Senator HATCH. I would be glad to do it, but you never invited me. I would love to do it. Lowell Weicker was teaching a graduate class in constitutional law here at, I think it was George Washington. It was a graduate class, an advanced class, which I always found kind of interesting, and the students finally just rose up in rebellion one day and said, we want to hear the other side, so he invited me to come down. I had the best time for 2 hours that I have had in years.

The CHAIRMAN. I would like to invite you to come to my class. I teach a course in constitutional law.

Senator HATCH. Well, I am being taught by Joe all the time. There is no question about it, and I am a very apt pupil sometimes.

The CHAIRMAN. Yes, you are.

Senator HATCH. Only sometimes. [Laughter.]

Are you all enjoying this debate we are having here?

Mr. DELLINGER. I am enjoying it very much and I am following the good counsel to stay out of it.

Senator HATCH. Let me just ask another question along that line. My purpose here is to show that these are not easy questions, that sometimes the demagogues on each side in overly simplistic ways try to make these arguments, and they are not easy questions. As the distinguished chairman has pointed out, there are times when the Supreme Court has to make some judgments in some of these areas, but they don't have to continually make new laws without justification.

Let me ask you this. Do you believe that the Supreme Court should recognize unenumerated rights guaranteeing American citizens access to important social services? For instance, we have had people say that it is a fundamental right to have health care, but let us include fundamental services such as education, health care, welfare. Do you think those are unenumerated rights, fundamental rights under the Constitution?

Mr. DELLINGER. Senator Hatch, I believe the Court should be extremely cautious for some of the reasons that I indicated in my discussion with Senator Thurmond about *Missouri v. Jenkins*—extremely cautious in areas where their decisions will cause a restructuring of the way—in areas where judicial decisions would require a restructuring of the budget or how government is organized, I think you should be especially cautious.

Take, if I could give you one example, *San Antonio v. Rodriguez*, involving the unequal school facilities in Texas. As a citizen, I think that disparate amounts spent on education is a very serious problem, but that courts should be very hesitant to offer remedies in those areas, particularly the Supreme Court as a national matter, as compared with State courts. For the Supreme Court to get involved as a national matter in school financing threatens to ensnare the judiciary into budgetary and policy matters for which they are really not very well equipped, and that should be a major restraint on the courts.

Senator HATCH. But it doesn't seem to be. That is my point.

Mr. DELLINGER. Well, I haven't seen—I mean, I think the Court did draw the line at *San Antonio v. Rodriguez* about getting involved in—

Senator HATCH. Do you agree with that case, then?

Mr. DELLINGER. I do reluctantly think that the majority was right that it was too difficult for the national courts to get involved in a national way in the complexities of school financing.

Senator HATCH. Well, I think that is interesting. I have a lot of other questions, but this has been—my problem is I could sit and chat with you all day, and perhaps I should attend some of your law school classes.

The CHAIRMAN. Why don't you take him to lunch?

Senator HATCH. Do you want me to take him off by myself and chat with him?

I have a considerable number of other questions, but I think what I will do is I will submit them to you in writing before the end of the day and let you take a crack at them that way.

It has been very interesting to me, and I commend you for the years of teaching that you have done. So many people in the law can go out and make commendable livings outside of teaching, and it is wonderful to see people who are dedicated to scholarly pursuits. Both you and your wife are, and I admire that and I appreciate that. I have enjoyed just discussing some of these matters with you.

Mr. DELLINGER. Thank you, Senator.

Senator HATCH. I was going to go into your position on equal protection, intent versus effects tests, disparate impact matters, affirmative action, the death penalty, and a variety of other things, but I will just submit those questions to you and we will end it for today.

I know that I have kept the distinguished chairman longer than I ever wanted to keep him to begin with, but I have enjoyed this discussion very much.

[See Questions and Answers following this hearing.]

The CHAIRMAN. I thank you, Senator.

You know, it is true, professor, that having the opportunity to have one of the leading constitutional scholars in the country before us raises a temptation. This is the book full of questions I have on constitutional issues, and I have to remind myself that you are not here as a nominee for the Supreme Court. You are here for an office that, although important, is of little consequence relative to the formation of public policy relating to changing the state of the law, finding rights that do or do not exist, eliminating rights that are there that have been recognized, et cetera.

So I will refrain from that and continue to call on your counsel on those matters, although you probably won't have much time to advise us in this body on things unrelated to the actual performance of your duties.

I might add that a couple of the questions asked of you by Senator Hatch elicited some quizzical looks on the face of your son. I expect you are going to be corrected at lunch. Now that he is a Yale School graduate, he has a different view on a couple of things, potentially.

At your urging, as you will recall, I did decide to do something I never thought I would do, and enjoyed. I am clearly not in your class at all, but I teach a course in constitutional law at Widener Law School, a seminar on Saturday mornings, for the last four semesters, and I have enjoyed the devil out of it.

I have two sons, though, one finishing law school and one starting law school, both of whom have decided to come in and sit in my seminar for 3 hours at least once, who later informed me that although the students seemed to like me, was I sure I was right about several of my views. So I am glad to see that we cannot control the thinking of our children.

Senator HATCH. I am glad to see this younger generation coming along, is all I can say.

The CHAIRMAN. That is right. But at any rate, I thank you very much. I thank my colleague for his usual good manners and hospitality. I would hope that notwithstanding the fact there will be some written questions for you that they are not too voluminous because it is the intention of the Chair to have your nomination before the executive committee meeting of this committee as soon as possible so we can get it to the floor, because the Attorney General is in need of having you on the job full-time, confirmed, and hopefully we can do that with dispatch.

It may mean that you will have to enlist the support of your son in helping answer some of those questions because it will take you a little time to do that, but the quicker you get the questions answered and back to us, the more rapidly we can move.

Again, I thank my colleagues for their indulgence. We will reconvene at 2:30 to consider the nomination of Ms. Acheson. You are excused and the hearing is recessed.

Mr. DELLINGER. Thank you, Senator.

[Whereupon, at 12:39 p.m., the committee was adjourned, to reconvene at 2:30 p.m.]

#### AFTERNOON SESSION

The CHAIRMAN. The hearing will come to order. As announced this morning, our second nominee that we will hear from today is Eleanor Acheson, to be Assistant Attorney General for Policy Development.

I realize that Senator Kerry, one of the two introducers, is on his way, and with the permission of—speak of the devil. Why don't I invite both of our colleagues to come to the table, and, Ms. Acheson, if you will come forward and sit in the middle there and be flanked by your Senators?

You were, at my request, not here this morning, Ms. Acheson, but I went into some detail about your background this morning when we opened the hearing with regard to both your nomination and the nomination of Walter Dellinger. So I will not take any more of the committee's time in that regard.

To let you know how we will proceed, after we hear from both Senators, I will ask you to stand and be sworn, then introduce any family you may have, have an opening statement, and then we will get on to questions.

Senator Kennedy.

#### STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator KENNEDY. Thank you very much, Mr. Chairman. I want to express, certainly, my appreciation for the scheduling of this hearing. We know that there is a great deal of work before the



committee, and both Senator Kerry and I want to thank you very much, and Senator Hatch, for accommodating the nominee here for this confirmation hearing.

I have had the good opportunity to know Eldie Acheson for a very considerable period of time, both personally and for a longer period of time by reputation. She has had a superb education at Wellesley College and George Washington Law School. And she is an outstanding litigator, advocate, and professional lawyer at one of our very fine law firms in Boston, Ropes & Gray.

One of the very important qualities that she brings to this job, and which I think is enormously commendable, and one of the reasons I think that Attorney General Reno selected her for this position as Assistant Attorney General for Policy Development, is because of her very strong commitment in pro bono work, in calling on the legal profession to involve itself to ensure that the rights secured by the Constitution are going to be available to individuals who otherwise would be denied them.

She has been a trustee of Roxbury Community College at some of the very difficult times at Roxbury Community College as they were attempting to deal with some of the very important challenges in student loan programs and administration, and she spent a great deal of time in working with community leaders and drawing on other skilled personnel to help ensure that that community college was going to continue.

She has been very active in a program called Women, Incorporated, that helps women who are subject to substance abuse to free themselves from addiction and return to a quality life. This was at a time when that particular issue and question didn't have the support that it has today. Even today, it is not a terribly high priority in most instances. She made an extraordinary commitment to that organization, ensuring the quality of the organization and setting it as a real model and as an example not only in Boston but for many other communities in Massachusetts. I think generally in New England and across the country, people are familiar with it.

She has been recognized by the Boston Bar Association as the outstanding lawyer in Boston in pro bono work and in challenging the legal profession to involve itself in the wide range of different legal defender organizations and other pro bono work.

She has solid experience in the Federal and State courts, and is a person of very considerable achievement. I think she will bring energy and commitment and imagination to the development of policy, which I think will bring success at the Justice Department, and it is a pleasure to be able to present a friend and someone whom I have great respect for who I know will be a great credit to the Justice Department.

The CHAIRMAN. Thank you, Senator.

[The prepared statement of Senator Kennedy follows:]

PREPARED STATEMENT OF SENATOR EDWARD M. KENNEDY

I want to thank the Chairman for scheduling this hearing on the nomination of Eldie Acheson to be Assistant Attorney General in charge of the Office of Policy Development in the Department of Justice. I have great respect for Eldie's ability, and I'm delighted that she has been chosen to be part of Attorney General Reno's team.

Eldie is a graduate of Wellesley College and George Washington University Law School. Since 1974, she has been with the Boston law firm of Ropes & Gray, where she has earned an excellent reputation as a skillful, effective and conscientious attorney and litigator.

One of the most pressing problems confronting the legal system is access by the poor to legal services. We need to strengthen the federal role in providing these services, and we also need to increase the involvement of private lawyers, and Eldie Acheson is well qualified to develop initiatives in these areas. She is widely known in Massachusetts as an active participant in these issues, and she is a strong supporter of *pro bono* activities.

Since 1987, Eldie has served as a trustee of Roxbury Community College in Boston's African-American community. She also provided *pro bono* representation for twelve years to Women, Incorporated, a residential treatment facility for women suffering from drug or alcohol dependence.

Eldie has also been an effective advocate within the Boston Bar for community service by private lawyers. In 1991, she earned the *pro bono* award of the Boston Bar Association's Committee on Public Interest Involvement.

Eldie Acheson will bring to the Office of Policy Development considerable intelligence, energy and commitment to securing for all Americans the Constitution's great promise of equal justice under law. I commend her to the Committee, and I urge that her nomination be promptly confirmed.

I also want to take this opportunity to commend the other nominee at today's hearing, Professor Walter Dellinger, who has been nominated to serve as Assistant Attorney General in charge of the Office of Legal Counsel. That office provides legal advice to the Attorney General and to the entire Executive Branch. It demands a "lawyer's lawyer," and I can think of no better nominee than Walter Dellinger.

He is an outstanding legal scholar, with broad experience and a deep commitment to justice and to the rule of law. He has advised members of this committee on many important issues over the years; and he has always brought wisdom and good humor to our deliberations.

Mr. Chairman, I commend the President on both of these outstanding nominations, and I look forward to continuing to work with them in the years ahead.

The CHAIRMAN. Senator Kerry.

#### STATEMENT OF HON. JOHN F. KERRY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator KERRY. Thank you very much, Mr. Chairman and Senator Hatch. Senator Kennedy has listed the various lifetime commitments in the legal profession and other efforts that Eldie has made in the public sector, so if I can ask simply that my full statement be placed in the record as if read, I will make a couple of quick summary comments.

The CHAIRMAN. Without objection.

Senator KERRY. If you take the sum of what Senator Kennedy has pointed to—the involvement with Women, Inc., the involvement with Roxbury Community College, the involvement with the *pro bono* effort in her law firm, the significant cases that she has argued on behalf of women's access to adequate health care, for the capacity of people to be represented in the justice system—this is a lifetime, not a sudden political appointment or a sudden conversion, but a lifetime of belief in the justice system, belief in the law, and belief in this country.

In fact, Eldie had a tough decision to make about whether or not she would even contemplate coming to Washington to be involved in the Justice Department here because many thought of her and spoke of her as perhaps one of our leading candidates for U.S. attorney in Massachusetts. But she decided that this is where she wants to be, and I think it is in keeping with that lifetime commitment and her understanding of the improvements yet to be made

in the justice system that she has taught about and practiced in that we can do better.

Personally, I think what Senator Kennedy has said and what all of us in Massachusetts know about her is that she comes with tremendous talent, a great intuitive intelligence that has been honed through the years at one of the best law firms in the country, and a great sense of public policy and a commitment to implement it.

So I think that the President and Attorney General Reno and all of us, Mr. Chairman and Senator Hatch, will be well served by her thoughtful, articulate, compassionate presence at the Justice Department, and I commend her to you very, very strongly.

The CHAIRMAN. Thank you very much, gentlemen. I know you both have additional duties and other responsibilities, and you are obviously welcome to stay, but I realize you have hearings going on yourselves right now. So I thank you for taking the time.

I would now like to ask Ms. Acheson if she will stand to be sworn.

Ms. Acheson, do you swear that the testimony you are about to give will be the whole truth and nothing but the truth, so help you God?

Ms. ACHESON. I do.

The CHAIRMAN. Thank you, and welcome again. Thank you for accommodating our schedule. Do you have any family you would like to introduce to the committee?

**TESTIMONY OF ELEANOR ACHESON, TO BE ASSISTANT ATTORNEY GENERAL, OFFICE OF POLICY DEVELOPMENT, U.S. DEPARTMENT OF JUSTICE**

Ms. ACHESON. Yes, Senator. My mother, Patricia Acheson, is here. My father unfortunately had a doctor's appointment scheduled for this afternoon which couldn't be put off, and I am also sorry that my grandmother, Ms. Alice Acheson, who is 97 and still doing a lot of things, but coming to Judiciary Committee hearings was unfortunately not among them. My brothers, David and Peter Acheson, unfortunately, I think, would have loved to have been here, but they are gainfully occupied in the city of New York and could not make the hearing.

The CHAIRMAN. Well, welcome, Ms. Acheson. It is a pleasure to have you here.

Ms. ACHESON. Senator Biden and Senator Hatch, let me first say how honored I am to have been nominated by President Clinton to be Assistant Attorney General for Policy Development. When Janet Reno, as Attorney General-designate, and I first spoke about that role and responsibility within the Justice Department, I was immediately interested. Her support for my nomination to fill this challenging position is an honor in itself.

The Office of Policy Development, which I will head if confirmed by the Senate, will work with all of the Department of Justice's divisions and components and other experts both within and outside of the Federal Government, including, of course, Members of Congress, to examine issues to formulate and coordinate policy views and to help develop and advance the Attorney General's policy initiatives. I come with no personal agenda, but to work with others



within the Department to address the pressing policy problems we face.

The Office of Policy Development will play a key role in developing administration initiatives to address the problems that plague the criminal and civil justice systems. It is no secret what those problems are. All involved with the criminal and civil justice systems—litigants, lawyers, judges, and other court personnel—know them. Indeed, virtually all Americans know them.

First, this country continues to experience a national epidemic of crime and violence that threatens Americans' safety in our homes and on the streets of our communities, and seriously jeopardizes our economic vitality. If we are to afford our citizens opportunities to improve our lives, we must reverse this trend. We must address the problems that breed violence and death in our communities, particularly among the young. We must continue vigorously to prosecute those accused of violent and pernicious crimes and ensure that those convicted receive certain and appropriate punishment.

America's youth are this country's most vital resource and we must do everything possible to protect them and to help them grow to adulthood to become contributing citizens. Under Attorney General Reno's direction, and with the participation of the appropriate Justice components and other agencies, we will be developing innovative crime prevention programs that stress prevention, early intervention, as well as tough but fair law enforcement initiatives to combat economic and white collar crime, illegal gun and drug trafficking, and all forms of violence.

Second, many of our citizens have no meaningful access to the civil justice system. We must continue to explore ways to reform the system and reduce civil litigation and, when litigation is unavoidable, to reduce its costs and delays. At the same time, we need to work to improve the affordability and accessibility of justice for all citizens.

Third, we will work to assure that the promise of equal protection under the law is a reality for all Americans in all respects, to ensure nondiscrimination in housing, education, and in the workplace; to assure nondiscrimination in the criminal justice process; and to help provide equal economic opportunity and empowerment.

Under the leadership of Attorney General Reno, the Office of Policy Development, along with the entire Department of Justice, will be working with you to develop new approaches to these persistent problems and new issues as they arise. We do not pretend that a single new perspective or set of new policies can be applied to solve all that ails our Nation's justice system, and thus we shall continue effective programs initiated by previous administrations. Our problems are bipartisan, and so should be our solutions.

The first criterion we will apply in evaluating any policy initiative will simply be whether it will work, and as Attorney General Reno has stressed, we will address those pressing issues with the cooperation of our colleagues in State and local governments, law enforcement, and the private sector.

Another significant responsibility of the Office of Policy Development will be coordinating the Department of Justice's role in the selection of U.S. attorneys and Federal judges. The Office will help

evaluate candidates for these important positions and advise and consult with the Attorney General about whom to recommend to the President for appointment.

Simply stated, the Clinton administration is looking for excellence, professional maturity, intellect, and character that forecasts good judicial temperament and ability. We will cast our net widely. The call for excellence has produced substantial diversity in the Clinton administration to date, and I expect no different experience with candidates for judicial nominations.

In view of these responsibilities, let me address briefly what I bring to the Office of Policy Development; first, my career and experience as a litigator. Generally stated, a litigator's role is to dive into different areas of substantive law and to master applicable principles quickly and well enough to apply them to meet the client's needs. This is what I have done in widely diverse cases, ranging from commercial, antitrust, tax, and employment matters, to environmental and civil rights law.

Second, my pro bono and civic activities provide valuable perspectives and experiences. I believe strongly in an attorney's obligation to the profession and the courts and the greater community to do pro bono work. I have handled a great number of pro bono matters, large and small, but all of great significance to the clients involved. I sit on the board of several pro bono agencies and I began the pro bono program at my law firm and have coordinated it since its inception.

For 12 years, I served on the board of directors of Women, Inc., which Senator Kennedy described, and for 6 years I served under both Governor Dukakis and a year under Governor Weld as a trustee of the Roxbury Community College, the only public educational institution in Massachusetts primarily serving people of color and ethnic and language minorities.

Third, I must mention, and do more than mention, but emphasize my clerkship from 1973 to 1974 with Edward Thaxter Gignoux, U.S. District Court, District of Maine. Judge Gignoux was not only a judge of that court, he was the only judge and he was the court throughout the whole State of Maine, and what a judge he was. His intelligence, his excellence, his integrity, his commitment to the law and the full and fair application of the law, his respect for the interests and concerns of all who came before the court, litigants and lawyers alike, his deep caring for the work of the court and the development of the law itself set the example. He taught me much about the law and the courts, and how each in their own way must reflect the Constitution and serve the people.

From these experiences and others, I believe I have developed legal, policy, and management ability, the commitment to public service, some judgment, patience, open-mindedness for the debate, and consensus-building skills that we will need for the roll-up-your-sleeves policy and program development effort that I believe will be the mark of Janet Reno's tenure as Attorney General.

I have seen people of goodwill throughout the Commonwealth of Massachusetts work incredibly hard to survive and who want to succeed, who want to get off drugs and have their children back, who want to have an education, who want to have the responsibilities and trust and rewards of a job and a safe future with their



families. I have seen those people struggle in their neighborhoods, struggle for access to a better life, and unfortunately struggle with the legal system.

We can do better than we have done and we must do better. Serving in the Office of Policy Development will, I hope, give me a chance to participate and contribute to this important work.

I just want to say, Senator Biden and Senator Hatch and Senator Feinstein, that I also appreciate the time that you and other Senators have afforded me before today's hearing to meet with you here and in other venues and to talk about issues that are of importance to you, and I have very much appreciated that courtesy and opportunity and I look forward to continuing it.

[The prepared statement of Ms. Acheson follows:]

#### PREPARED STATEMENT OF ELEANOR D. ACHESON

Thank you Senator. I would like to introduce my parents, David and Patricia Acheson, seated behind me. Unfortunately, neither my grandmother Mrs. Alice Acheson nor my brothers David Acheson, Jr. and Peter Acheson or their families could be here today.

Senator and members of the Judiciary Committee, let me first say how honored I am to have been nominated by President Clinton to be Assistant Attorney General for Policy Development. When Janet Reno as Attorney General-Designate and I first spoke about the role and responsibilities of the Office of Policy Development, I was immediately interested. Her support for my nomination to fill this challenging position is an honor in itself.

The Office of Policy Development, which I will head if confirmed by the Senate, will work with all the Department of Justice's divisions and components and other experts both within and outside of the federal government (including Members of Congress) to examine issues, to formulate and coordinate policy views, and to help develop and advance the Attorney General's policy initiatives. I come with no personal agenda but to work with others within the Department to address the pressing policy problems we face.

The Office of Policy Development will play a key role in developing Administration initiatives to address the problems that plague the criminal and civil justice systems. It is no secret what those problems are. All involved with the criminal and civil justice systems—litigants, lawyers, judges and other court personnel—know them; indeed, virtually all Americans know them.

First, this country continues to experience a national epidemic of crime and violence that threatens Americans' safety in our homes and on the streets of our communities and seriously jeopardizes our economic vitality. If we are to afford our citizens opportunities to improve their lives, we must reverse this trend. We must address the problems that breed violence and death in our communities, particularly among the young. We must continue vigorously to prosecute those accused of violent and pernicious crimes and ensure that those convicted receive certain and appropriate punishment.

America's youth are this country's most vital resource, and we must do everything possible to protect them and to help them grow to adulthood to become contributing citizens. Under Attorney General Reno's direction, and with the participation of the appropriate Justice components and other agencies, we will be developing innovative crime-prevention programs that stress prevention, early intervention, as well as tough but fair law enforcement initiatives to combat economic and white collar crime, illegal gun and drug trafficking and all forms of violence.

Secondly, many of our fellow citizens have no meaningful access to the civil justice system. We must continue to explore ways to reform the system and reduce civil litigation, and, when litigation is unavoidable, to reduce its costs and delays. At the same time, we need to work to improve the affordability and accessibility of justice for all citizens.

Thirdly, we will work to assure that the promise of equal protection under the law is a reality for all Americans in all respects: to ensure non-discrimination in housing, education and in the workplace; to assure non-discrimination in the criminal justice process; and to help provide equal economic opportunity and empowerment.

Under the leadership of Attorney General Reno, the Office of Policy Development, along with the entire department of Justice, will be working with you to develop



new approaches to these persistent problems and new issues as they arise. We do not pretend that a single new perspective or set of new policies can be applied to solve all that ails our nation's justice system and, thus, we shall continue effective programs initiated by previous Administrations. Our problems are bipartisan, and so must be our solutions; the first criterion we will apply in evaluating policy initiatives will be simply whether they will work. And, as Attorney General Reno has stressed, we will address these pressing issues in the cooperation of our colleagues in state and local governments, law enforcement, and the private sector.

Another significant responsibility of the Office of Policy Development will be coordinating the Department of Justice's role in the selection of United States Attorneys and federal judges. The Office will help evaluate candidates for these important positions and advise and consult with the Attorney General about whom to recommend to the President for appointment. Simply stated, the Clinton administration is looking for excellence, professional maturity, intellect, and character, that forecast good judicial temperament and ability. We will cast our net widely. The call for excellence has produced substantial diversity in the Clinton administration to date, and I expect no different experience with candidates for judicial nominations.

In view of these responsibilities, let me address what Eleanor Acheson brings to the Office of Policy Development.

First, my career and experience as a litigator. Generally stated, a litigator's job is to dive into different areas of substantive law, and to master applicable principles quickly and well enough to apply them to meet the client's needs. This is what I have done in widely diverse cases ranging from commercial, antitrust, tax and employment matters to environmental and civil rights law.

Second, my pro bono and civic activities provide valuable perspectives and experiences. I believe strongly in an attorney's obligation to the profession, the courts and the greater community to do pro bono work. I have handled a number of pro bono matters, large and small but all of great significance to the clients involved; I sit on the board of a pro bono legal service agency; and I began the pro bono program of my law firm and coordinated the pro bono program there. For twelve years I served on the board of directors of and represented a social service agency in Boston which operates a residential treatment center for drug and alcohol addicted women and their children. For six years I served as a trustee of the Roxbury Community College, the only public educational institution in Massachusetts primarily serving people of color and ethnic/language minorities.

Thirdly, I must mention my clerkship in 1973-1974 with Edward Thaxter Gignoux, United States District Court, District of Maine. Judge Gignoux was not only a judge of that court, he was *the* Judge and *the* Court. And what a judge he was! His intelligence, his excellence, his integrity, his commitment to the law and the full and fair application of the law, his respect for the interests and concerns of all who came before the court, litigants and lawyers alike, his deep caring for the work of the court and the development of the law itself set the example. He taught me much about the law and the courts, and how each in their own way must reflect the Constitution and serve the people.

From these experiences and others, I believe I have developed legal, policy, and management ability; the commitment to public service; judgment; patience; open-mindedness for debate; and consensus-building skills needed for the "roll up your sleeves" policy and program development effort that I believe will be the mark of Janet Reno's tenure as Attorney General. I have seen people of good will who work incredibly hard to survive and then succeed, who want to get off drugs and have their children back, who want to have an education, who want the responsibilities, trust, and rewards of a job and a safe future with their families, struggle in their neighborhoods, struggle for access to a better life, and unfortunately struggle with the legal system. We can do better than we have done and we must do better; serving in the Office of Policy Development will, I know, give me a chance to participate in this important work.

The CHAIRMAN. Well, thank you very much and, again, welcome.

We will go by a 10-minute rule, please, and let me begin by asking you to tell me a little bit about your particular responsibilities. You have mentioned them here, but in terms of your—the title is Policy Development. Does that mean that you are going to be working with the Attorney General to determine what priorities the Justice Department should pursue?

Case in point: some administrations come to town and conclude that in the Criminal Division they want to focus on white collar

crime instead of drug enforcement. Others come into town and decide that drugs will be the focus and white collar crime and S&L fraud be not secondary, but will not be the focus. You have very limited resources relative to the problems—"you" meaning the Justice Department, notwithstanding the fact that we have increased their budget a great deal over the last 6, 8, 10 years.

For example, we are about to debate the crime bill, or we are about to introduce a crime bill and hopefully—not hopefully—we will debate it. There is going to be a dispute about habeas corpus and what position the administration will take on habeas corpus, what it should look like. Will you play any role in that? Is that policy development? Talk to me a little bit about what the Office is going to be.

Ms. ACHESON. If I said yes, Senator, to that broad, sweeping question, I probably wouldn't be fully addressing your concern, but yes is a good place to start. I will be working—I expect to be working with the Attorney General to establish the policy priorities for the Department. I think you know through the many speeches that she has already given since her confirmation some of the things that are very much on her mind—crime and violence, enforcement approaches, dealing with sentencing issues to ensure that people who are convicted of violent and particularly pernicious crimes go away for a long time and that we have the prison people for those people to be able to be sentenced, prevention, early intervention, and issues like that.

I expect to be fully involved with her and with others in the Department and with people on this committee and with outside experts and local law enforcement on those sorts of issues, particularly with respect to aspects of the crime bill. I do expect that the Office of Policy Development will be very much involved with that. I personally have not been involved to date, as the Attorney General and I thought it was inappropriate to become involved with anything until I passed by this—

The CHAIRMAN. I think you are right. I mean, hopefully you will play no part in it because hopefully by the time you are confirmed, which will be very shortly, we will have decided on what the crime bill should be. The Attorney General's Office has been working with us on a weekly, daily basis to determine what kind of legislation to formulate. So I didn't mean that I hope you personally won't, but hopefully the process will have moved along far enough.

But there will be discussions about a number of other things. Traditionally, the Office has reviewed and developed legislation on policy proposals that are of major concern to the Justice Department in the areas of criminal and civil law, and coordinated those efforts to make sure that we had legislative enactment of whatever it was that was the priority.

What you are saying to me is you believe that that function will continue and you will be—

Ms. ACHESON. That function will definitely continue, and it will also continue, as I know the Office has been involved in the past, with programmatic initiatives. There are many things that I think the Attorney General believes we can achieve to promote her policy priorities and the initiatives she would like to see without having to ask by legislation—without having to ask for new legislation, but



just simply an efficient review of programs already available both within the Department of Justice and within other agencies that can be brought together. Good, efficient integration and management of those programs together with local communities and neighborhoods, I think she believes is a resource we should look to as something we can work with as well.

The CHAIRMAN. According to the 1992-93 U.S. Government Manual, "The Office of Policy Development performs high-level policy development and coordination, including legal research and development of the Department's policy agenda." Now, we have spoken a little bit about how that would function, how that would be played out, but what will be the White House's involvement in the formulation of policy at the Justice Department and what role will you play? Will you be the person who interfaces with the White House, or how do you see that, if you have been told how that would function?

Ms. ACHESON. Senator, if I can answer that question by an example, this is how I understand the White House will be involved. Where there are broad administration initiatives, such as, for example, the empowerment zone legislation that Secretary Cisneros and the Department of Housing and Urban Development has sort of led with, there is, in fact, a working group that is coordinated by the Domestic Policy Council staff that has people from HUD and from HHS, from the Department of Justice, people from the Office of Policy Development who have been involved with that.

If that piece of legislation goes forward, that will involve resources and efforts and programs from many agencies, and in that sort of a situation where we have multiagency, multidepartment approaches to solving problems of communities, both rural and urban, the Department of Justice will be involved with the White House through essentially the Domestic Policy Council.

But I do expect, beyond those kinds of multidepartment efforts, to really have much contact with the White House at all. I know that the Attorney General sits on the Domestic Policy Council and she consults regularly with those at the White House on where she is going with issues in the Department of Justice, as do the other heads of departments, and I think she will be taking the lead in a broad sense on that.

The CHAIRMAN. Well, you accurately describe how it functions. One of the points I want to make, and the reason I bring this up is we have gone, with good reason, over the last several administrations, including this one—we have talked at length about certain functions within the Justice Department, and functions of U.S. attorneys who answer to the Justice Department, that are beyond the scope, and should be beyond the scope and purview of political influence. We had long discussions resulting in a policy memorandum about when it is appropriate for someone at the White House to pick up the phone and call someone at the Justice Department, and how and who.

I just speak for me and only me. I would hope that you are not in that category. My staff wrote me a lot of questions about how you are going to be insulated and separated. I hope you are not insulated. I hope the hell someone at the White House can pick up the phone and say, look, we want 100,000 cops, now you tell us



how you are going to go ahead and get that for us, you tell us how to do that; or the President wants the death penalty and we want a crime bill with the death penalty in it. I know the Attorney General will know that, but the Attorney General has 6,000 things on her plate that she is going to have to do, from the totally unforeseeable Wacos of the world straight through to a specific legislative agenda.

So I would hope that you build a working relationship with the political people at the White House. The President was elected as a politician. The President ran on a platform that said this is how I want to see the Nation change in terms of the criminal justice system, the civil justice system.

I just want to make it clear for the record, from this Senator's perspective, there is a distinction between interfering on the progress of an investigation, a case, or whatever, and policy relating to what the criminal justice should look like unrelated to any individual corporation or entity.

So I respectfully suggest that if you do not establish a working relationship, you personally, with the political people who are on the Domestic Policy Council—and hopefully there are political people on there in the best sense of the word—it will make the Attorney General's job harder, not easier. It seems to me one of your functions is to make sure that there is coordination between what the President wants done legitimately, and has a legitimate right to seek to be done, and the Agency in charge of getting that done being prepared to be able to implement from the Executive's point of view how to get it done.

I will come back later, if I may. My time is up. I see the little red light went on, and I am also just handed a note that there is a vote on the Roth amendment that just began. There are 12 minutes left.

Do you want to start or do you want to wait?

Senator HATCH. Why don't I do that because I don't want to take too much time?

The CHAIRMAN. OK, but I will be back and ask you about judges and the selection process. I thank you. I am going to leave and go vote, so by the time the Senator is finished there won't be much of an interruption when we go to the Senator of California.

Do you want to go vote and then come back?

Senator FEINSTEIN. Yes.

The CHAIRMAN. All right, so we will leave you in the tender hands of—the first you are taught as a freshman Member of the U.S. Senate is never leave a hearing or the floor in the hands of the other party when you are gone, but I have great faith and trust in the distinguished Senator. All kidding aside, we are going to leave and let the Senator question and then we will be back to continue.

Senator HATCH. I will recess until you get back.

The CHAIRMAN. OK.

Senator HATCH. Well, welcome to the committee, and congratulations for this opportunity.

Ms. ACHESON. Well, thank you.

Senator HATCH. I have to be gone, so when I go to vote I won't be back. So I just wanted to take these few minutes and congratu-

late you on this opportunity and say that I have looked over your credentials and they seem to be outstanding. Of course, your two Senators are both friends of mine and I think having them here to testify for you is a very good thing.

This Office of Policy Development is very, very important because it is basically the think tank for the administration on legal affairs and personnel in this area, and so it is a very, very important job and I commend you to have that opportunity.

There has been considerable press speculation that the Clinton administration might try to transfer or otherwise clean out some of the career employees hired by the Reagan and Bush administrations that are still in certain offices in your division and others as well, including the Office of Policy Development.

For instance, in the May 15, 1993, issue of the *National Journal*, it was reported that "Some Democrats fear that Republican lawyers were entrenched in the Office of Legal Policy," at Justice. Now, can you assure me that you will not retaliate or otherwise take action against the career lawyers in your Office who were hired by the preceding administrations?

Ms. ACHESON. Senator, I can assure that I will not. I would like to say that in my dealings with the people who have been in that Office that I have found there—and I have met every single person who is presently at the Department of Justice working in the Office of Policy Development. There are a number of people who are detailed elsewhere and many of those I have not met, but every single person I have met, and I have talked with all of those people, I find to be absolutely outstanding.

Not only do I have no intention of retaliating against them, I have every intention of working very closely with them, and many of them have been extraordinarily helpful in preparing me to assume the duties of that Office, if confirmed.

Senator HATCH. Well, thank you, because I think you will find that these are professionals who basically are going to do what is right in these positions. Now, naturally, if there is somebody who doesn't fit that category, that is another matter, and I appreciate that.

What role in the process of selecting Federal judges would you anticipate for this Office?

Ms. ACHESON. Senator, as I understand it, the President will be sending over candidates for the district court, and also for the court of appeals. The administration has indicated that it will follow the traditional policy of, with respect to the district court, having Senators from the Democratic party nominate or recommend to the President candidates for the district court judges, and the White House has indicated that it is welcoming from every quarter suggestions for people to serve on the Federal courts of appeals.

People who are nominated or suggested from the Senate for the district courts and from every quarter for the courts of appeals will come over to the Department of Justice, and under the basically ultimate supervision of Janet Reno as Attorney General the Office of Policy Development will essentially handle, I guess vetting or evaluation is the appropriate word, of those—well, they are not nominees yet, but of those recommendees, of those candidates.

Senator HATCH. What do you do if both Senators are Republicans in a particular State?

Ms. ACHESON. Well, I believe then we will look to the senior ranking Democratic person either in Congress or the Governor, or whoever is the senior Democratic elected official for that suggestion or for that nomination.

Senator HATCH. I will make it harder. What if one of the Republicans is a member of the Senate Judiciary Committee? [Laughter.]

Ms. ACHESON. I am afraid the answer is still the same, Senator Hatch.

Senator HATCH. Still the same. There have been some press reports that the Clinton administration has been using outside people and outside groups to screen or vet these nominees. Are you aware of that?

Ms. ACHESON. I am neither aware of the reports nor am I aware that that is the case. My expectation is that the process will come to the Department of Justice and we will attempt to handle it.

Senator HATCH. OK; back to that other choice, let us say you have two Republican Senators and they decide to have a judicial selection commission that is broadly picked; in other words, Democrats, Republicans, et cetera, et cetera, but basically broad-based, and they are willing to recommend three to five people to the administration. Would that be a system that you would be happy to work with?

Ms. ACHESON. For the district court?

Senator HATCH. For the district courts, yes, not for the circuit courts.

Ms. ACHESON. I believe the way it is going to work—and appreciate, Senator, that I am not yet involved with this at all, so I speak from a distance with respect to it. We would look first to—if there was a Democratic Governor or a group of Democratic Congressmen who had a different view, we would want to know their view first and find out who their candidates were. If, in fact, there were a bipartisan approach to this, which there is in some States, or an arrangement between the two parties as to how this was going to be done, I don't think we would have any problem with it.

Senator HATCH. Well, let me encourage you to go with a system like that. In the Carter years, there were two of us who were Republican Senators—this is one reason why I am concerned, not just because of Utah. I think we have got our district court bench filled. But what we did to resolve the problem and to get rid of the politics of it is we would set up a judicial selection commission and ask them to pick three to five. They always had Democrats and Republicans that they picked in each case.

What Carter did is he chose the most well-known Democrat on the list in each case, and they were outstanding people and still are on the bench to this day. So I would commend that kind of a system to you if it is used in a fair and bipartisan way, because that way you have the benefit of having support from your Senators who, I think, if they really disagreed and they thought it was a politicized process could raise a lot of havoc here in the judicial selection process. So I would recommend, if they use a system like that, it would be something that might be satisfactory to you, especially



if you don't see any politics being played with it. It is strictly a nonpartisan approach to it.

I would like to see that personally in a much more widespread way used all over the country. I think it would be a lot better for our court system and it would depoliticize it a lot more than it has been in the past, as you know. But, of course, you have to do whatever you think is right. In my case, I would appreciate that type of a system because that is what I would use, and I would appreciate cooperation from the administration, which the Carter administration did do and they got the very best people I thought they could possibly get on the district court bench. But there are other instances where that might be equally as valid.

I have a lot of other questions, but frankly I am very pleased with your nomination. I think you will do a very good job. You have widespread legal experience in both the State and the Federal courts, and I have looked that over and I just feel like the President has made a good choice in this instance and that you will do a very fine job. I wish you well and you will have my support.

Ms. ACHESON. Thank you, Senator Hatch.

Senator HATCH. Well, thank you. With that, I will recess these hearings until Senator Biden gets back.

Ms. ACHESON. Thank you.

[Recess.]

The CHAIRMAN. The hearing will come to order. I will yield to Senator Feinstein when she gets here—she is on her way—because she has not had a round, but let me, if I may, pursue with you a moment the judicial selection process. Can you explain to the committee what your role will be in that process with as much precision as you can?

Ms. ACHESON. Certainly, Senator. I expect that the Office of Policy Development within the Department of Justice, and under the supervision of Janet Reno, will essentially be handling the Department's evaluation of district court and court of appeals candidates who will be referred from the White House. We will be evaluating them and then recommending—working with the Attorney General, but essentially recommending to her, and working with her, on who we feel she should be recommending to the President for nomination to the Senate.

The CHAIRMAN. So the way the process will work, if I understand it correctly, is that the White House will send over names to the Justice Department, to the Attorney General, but they will be referred to your Office.

Ms. ACHESON. That is true.

The CHAIRMAN. You will then do the background—not necessarily the FBI kind of background investigation, but you will look at those persons and do an investigation of sorts as it relates to everything from, I assume, their judicial demeanor, their educational background, what the bar associations think of them, et cetera. Is that the idea?

Ms. ACHESON. Exactly, Senator. I think the Clinton administration—I think the President himself has indicated that what the standards are for judges in the Clinton administration for both the district courts and the courts of appeals is primarily excellence, intellectual ability, good character, temperament, integrity, issues of

character that would suggest somebody is going to be a very good judge both by way of temperament and by way of ability.

We are also hoping to achieve substantial diversity in nominating people of color and other minorities, and women. Our experience so far—it isn't mine, but I observe in the Clinton administration nominations there has been substantial diversity which has been produced largely by the standards of excellence and with no special effort.

So I hope that we will have the exact same experience with the judicial nominations, and that is what we will be looking for and that is what we will be evaluating people for both the district court and the courts of appeals on. With respect to the district court—well, with respect to both courts, I think we were also looking for people whose lives, particularly their professional lives, indicate an interest in their communities, in pro bono work, in civic activities; broadly stated, a deep interest in the profession and in the law. And for a trial judge, we would like to see some litigation or comparable experience, and for a judge for one of the Federal courts of appeal we would like to see writings, whether it is briefs or whether it is articles or something that suggests a deep study of the law and legal issues and decisions that would particularly help somebody be a good court of appeals judge.

The CHAIRMAN. As you know, you have your hands full.

Ms. ACHESON. Very.

The CHAIRMAN. The last administration was less than—well, the last administration did not in a very timely fashion send us judicial nominees to act on, and to be blunt about it, this administration has equally bad a record. It is disappointing that we are sitting here—and this is not your fault at all, just so you know what you are about to get into.

It is disappointing that we are sitting here at the end of the month of June with not a single judicial nomination having been sent to this committee, and there are literally well over 100–127 judges, district and circuit court, where the vacancy average has been well over a year. So I want you to know, since you are going to be responsible for this—and there are a lot of explanations for why it has taken so long. We got off to a slow start, the Justice Department team wasn't in place, et cetera.

But I just want you to be aware that you are going to have your hands full, and hopefully you can expedite as rapidly as possible these nominations. For example, the Judicial Conference has sent forward a proposal to increase the size of the Federal judiciary. I have been working on a bill as well to increase the size of the Federal judiciary, but I will not act to increase the size of the Federal judiciary one single solitary judgeship until we fill the vacancies we now have. It has nothing to do with this administration, but there are a couple of vacancies—one, at least, that has been vacant for over 4 years without a name ever having been sent to this committee.

So I look forward to working with you. I know that it is a priority, but I just want you to know one other thing. If you all send us 20, 30 judges at a crack, we cannot process them that fast. We have, on average, over the last 10 years spent only 10 weeks from the time we get the name of a judge and report them out. It has



been, on average, a year before we get a name, and so we have got to really move it along and I would hope that you will be able to expedite it.

I realize the limited resources and you have the similar problems we will have in terms of vetting these, but there is, as you know from being a practicing attorney and having been involved working with the U.S. attorney's office, a serious shortage particularly of district court judges.

The last thing I will suggest to you is every administration always wants to fill out the circuit courts first. I will not do that. The crying need is at the district court level, the court of original access, if you will, of the Federal courts. So we will process circuit court of appeals judges, but just—not that I would expect this, but let us assume you sent us 10 circuit court judgeships and no district court judgeships. This committee will take on an administration-like sense of speed and urgency. [Laughter.]

The CHAIRMAN. All right?

Ms. ACHESON. I hear you. [Laughter.]

The CHAIRMAN. OK, good, good, but I mean it. I am not joking. We must fill those district court slots.

Ms. ACHESON. Senator Biden, I just want to say that one thing I have done at the request of the Attorney General is to meet with a number of the chief administrative judges in the various circuits, most of them the chief judges of the various circuits, and all I can do is tell you that they from their own perspectives have underscored exactly the points that you were making, and they are Republicans and they are Democrats.

The CHAIRMAN. Yes, that is the point; it is across the board.

Ms. ACHESON. They are all over the place, and in many circuits—particularly Senator Feinstein's circuit, the ninth circuit, has a crying need, and we are well aware of it. And I know you are not joking and we promise to move as expeditiously as we can, and hope to have some people up here soon.

The CHAIRMAN. For the longest time, the Federal courts were convinced that the Judiciary Committee was the bottleneck because of our great press that we get and we give ourselves. So a year-and-a-half ago I initiated the Biden Newsletter. I write to every Federal district court judge quarterly and I give them a listing of every single vacancy that exists in the United States of America—when it became vacant; when we were sent a name, which is almost hardly ever; how long it is going to remain vacant; and whose fault it is.

I mean that sincerely because the Federal judges, like everyone else in America, assume that when in doubt blame Congress. This is not on our watch. At the same time, you are going to get pressure, as I will get pressure, from the judges to add more judgeships. Now, I wrote the last bill to increase the judgeships. I am all for it, and if I would do it in a Republican administration, I would certainly add judges in a Democratic administration, but we have to fill the vacancies that are there.

I know you know this. I am saying this more for, quite frankly, your benefit so that everybody knows that you are having the pressure put on you as well because we have got to get it moving, and particularly district court judgeships. Everybody wants to be on the



circuit court. Everybody thinks that is the important work, but that is not the place that the vast majority of people who go in the Federal courts see. Part of the crisis, in my view, is confidence in the Federal court system and the court system generally is inability to gain easy access to the courts when you have standing to gain that access.

Anyway, I thank you for listening to me, and I really will do anything I can to assist you in moving along judicial nominations.

Senator FEINSTEIN.

Senator FEINSTEIN. Thank you, Mr. Chairman. Mr. Chairman, I have a statement that I would like to include in the record.

The CHAIRMAN. Without objection.

[The prepared statement of Senator Feinstein follows:]

#### PREPARED STATEMENT OF SENATOR FEINSTEIN

Thank you, Mr. Chairman. Just three quick points and an observation this morning.

First, let me welcome and thank our distinguished colleagues doing the introductory honors today for their respective nominees.

Second, my sincere congratulations to Mr. Dellinger and Ms. Acheson, two superbly qualified attorneys whom I know will well serve the President and Attorney General Reno.

Third, and finally, Mr. Chairman, congratulations to the President also are in order today.

In addition to providing this Committee with a slate of very talented Assistant Attorney General candidates, President Clinton has succeeded in crafting a management team at the Department of Justice of which I for one think he can be extremely proud. A group of lawyers that, I am confident Mr. Chairman, will distinguish itself and the Department in the coming years.

One immediate opportunity to do so, as I have said directly to Ms. Reno, Mr. Heymann and Mr. Hubbell, lies in the area of illegal immigration control. My observation this morning, Mr. Chairman, is simply this:

It will take all of our best people, pulling together very hard, Mr. Chairman, to fairly, but quickly and meaningfully, bring illegal immigration under control in this country. I have spoken recently, and will speak again soon at greater length, about the significance of this problem to the State of California and the Nation.

I raise it here today, Mr. Chairman, simply to alert the nominees before us, and their colleagues, that I will be looking to them for creativity and leadership in this area. I expect, for example, to be in close contact with Ms. Acheson as the Administration continues to craft policy and begins to move through Congress legislation—whether my own or other Members' bills—to redirect Federal resources in the short run to begin to come to grips with this massive problem.

I also will look to Professor Dellinger to advise the Attorney General, as Chief of the Office of Legal Policy, on the permissible scope of efforts to streamline the asylum and deportation process.

With that, Mr. Chairman, and my thanks to the distinguished Chairman of the Immigration Subcommittee—Senator Kennedy—for his encouragement and openness to collaboration in this area, I wish both of our nominees today the best of success in their new posts, and look forward to their fastest possible confirmation.

Senator FEINSTEIN. Welcome, Ms. Acheson.

Ms. ACHESON. Thank you.

Senator FEINSTEIN. I hope shortly I will be able to say congratulations, but in the interim just a couple of questions. One, I know the chairman questioned you on the crime bill, and I would be most interested in a more specific response not now, but later, from Justice on the habeas corpus issue, exactly where Justice is coming down, because that is a controversial part of the bill, and also from the administration because much of what I get is that perhaps the bill is being held up waiting for the administration's response.

I, for one, wanted to be on this committee, and the chairman very graciously said that the crime bill would be a major part of the deliberations of this committee, so I am still waiting for that to happen. I come from a city, and there probably is no more central issue in the United States in big cities than crime today. So I think in terms of the public policy of Justice, as well as weighing in on this bill, time is of the essence. If you would like to comment, I would be most happy to hear your comments.

Ms. ACHESON. Well, just briefly, Senator, as I believe I said in answer to some questions of Senator Hatch when you were away voting, I have been until this point at some distance from these matters, but I have not been at some distance from the headlines and the experience of my own city, which in many respects is not dissimilar than San Francisco, and certainly the entirety of Massachusetts.

Everywhere in the country, people are coming to the same conclusion, and it is absolutely the view of the Attorney General, if we do not do something to stop this incredible explosion of crime and violence, we will lose not only another generation of young people, but we are increasingly losing communities and neighborhoods because people, even if they aren't killed, are afraid to walk out of their houses to use amenities of their communities, even to start thinking about how to develop their communities. It is absolutely the thing that I know the Attorney General feels the strongest about.

I am also aware that the habeas issues that are presented in the context of the crime bill, but also in the ongoing dialog in this country between prosecutors and the defense bar about what is fair on the one hand and what is going to bring us to the question of finality on the other so that we can have people have fair trials with good lawyers representing them to eliminate the kinds of problems that come up postconviction, and then have some full but final opportunity postconviction to raise any issues—it sounds easy to state and it is very, very complex to put together, given all of the different views about what is fair and what is final, or what should be final.

It is absolutely the first thing that my Office will weigh in on. In fact, my Office is weighing in on it without me there. If I am confirmed and head that Office, it will absolutely be something that I will be involved with, and I know the Attorney General is ready to get into this.

Senator FEINSTEIN. Thank you very much. I would hope so. The second subject is one that I mentioned to the Attorney General when she was before us. I wrote her a letter asking for strategy. I mentioned it to Mr. Hubbell, Mr. Heymann, and I will mention it to you. It is the issue of immigration in this country and the fact that we do not enforce the laws that are on the books, and we also have a need to do that as well as perhaps look at some new laws.

I have asked for a strategy. I was very disappointed to see that the INS budget is down as it came from the administration. I was very disappointed to see that the INS Border Patrol has fewer positions in it this prospective year than it does this present fiscal year. You know, the Attorney General said that she wanted to do

something. Mr. Hubbell said he did, Mr. Heymann said he did, and yet right now I see things going in the other direction.

I would like to know, have you personally discussed this issue as a policy person within the Department?

Ms. ACHESON. I have not, Senator, as of this moment discussed this issue or specifics of this issue. I can tell you that it is an issue that the Attorney General feels very strongly about. I do not have any explanation or comment on the budget issue. I was not at all involved with that.

I do know this, that the choice of Doris Meissner as the person to head the Immigration and Naturalization Service is a choice that was carefully and deliberately made because immigration is something known to every single person in that Department that has got to be a priority. Webb Hubbell's Office, the Associate Attorney General's Office, has taken direct responsibility for INS, and I know that Mr. Hubbell and Ms. Meissner, if confirmed, and the Attorney General and my Office, when we get to looking at immigration policy, are going to work very closely together to look at these issues very hard.

I think the strongest statement that can be made so far by the administration is the selection of Doris Meissner. I think she is someone who knows a tremendous amount about the issues that you talk about. I think she is committed to full enforcement of the laws that are on the books. I think she is very well aware, perhaps more so than—certainly, more so than I and more so than many about not only the issues that we all can talk about from a distance, but the experience of border States that I think many of us who are not from border States—I am from a coastal State, but it is not a border State in the sense that California is and Arizona and New Mexico and Florida and a number of States whose local economies are being assaulted and very burdened by immigration problems.

But it is something I can only assure you that the Attorney General feels strongly about and that the Department is going to work on hard. It will be a priority of this administration.

Senator FEINSTEIN. Well, I think probably the most positive thing about Ms. Meissner's appointment—and when she comes before this committee, I will certainly ask her the question to lay out her strategy, and I would be hopeful that when she comes before this committee she would have a strategy because every time I am mentioning it now, I don't get anything back on the other side.

So this is something that has to be met, I believe, by the administration, and it has to be met by your Department. The reason I raise it to you is if you are the policy person within the Department, I hope you will convey at least this Senator's—and I believe Senator Kennedy has been in the lead, Senator Simpson has been in the lead of legislation.

I come from the largest State and it is an escalating problem and I am very concerned because unless there are solutions, I fear there is going to be a very serious backlash by people. We already have one grand jury of a county in the State saying there should be a total moratorium on all immigration for 3 years. I think it is a problem that needs to be addressed, and what I kind of notice is



no one is willing to step up to the plate, so this concerns me very much and I would hope you would relay that for me.

Ms. ACHESON. I will certainly do that, Senator.

Senator FEINSTEIN. Thank you very much. Those are my two areas, the crime bill and immigration. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you. We have another vote. I have several additional questions, but what I am going to do is submit them to you in writing. You will have them today. They are not very voluminous.

[See Questions and Answers following this hearing.]

The CHAIRMAN. I know of no other questions the Committee has before us. If you can answer those questions quickly, we will hopefully be able to expedite the executive session, the process of voting on your nomination in the committee, and get it to the floor.

I look forward to working with you and I look forward to us accomplishing some important things, not the least of which are the two areas that the Senator from California mentioned.

Ms. ACHESON. Well, thank you very much.

The CHAIRMAN. Without any further questions, we thank you. We thank your mother for being here. We told you, mom, it would be quick and easy.

Senator FEINSTEIN. That is a first, I think, just about.

The CHAIRMAN. No; I think it is a second.

Senator FEINSTEIN. Quick and easy.

The CHAIRMAN. We always remember the ones that aren't. There have been too few that aren't, but there have also been a bunch that have been and I am delighted this has been as well. So I thank you very much, Ms. Acheson, and look forward to working with you.

Ms. ACHESON. Thank you very much.

The CHAIRMAN. We are adjourned.

[Whereupon, at 3:44 p.m., the committee was adjourned.]

[Submissions for the record follow:]

**SUBMISSIONS FOR THE RECORD**

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**QUESTIONS AND ANSWERS**

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June 23, 1993

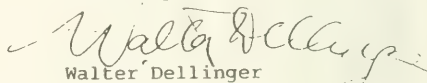
The Honorable Joseph R. Biden  
United States Senate  
Committee on the Judiciary  
Washington, D.C. 20510-6275

Dear Senator Biden:

I am delighted to respond to your letter of yesterday concerning my confirmation hearings in front of the Senate Judiciary Committee. Upon receipt of the additional questions posed by Senators Hatch, Grassley, and Pressler, I immediately directed my attention to preparing answers to those questions. Enclosed are my responses, which I hope will prove satisfactory. If I can provide any further information please do not hesitate to contact me at 514-2051.

I appreciate the Committee's consideration of my testimony.

Sincerely,

  
Walter Dellinger

## QUESTIONS FROM SENATOR LARRY PRESSLER

1. If you are confirmed, will your office examine whether EPA's interpretation of the Clean Air Act as it concerns ethanol is legally justified, and if not, render an opinion so as to clarify the situation.

OLC's responsibilities include answering requests for legal advice from the heads of Executive Branch agencies and resolving inter-agency legal disputes referred to the Office. If I am confirmed, and if OLC were to receive an appropriate request or referral from an Executive Branch agency concerning the interpretation of the Clean Air Act, I would study the issue and prepare an opinion. The June 11 letter from you and Senators Grassley and Brown discusses, in some detail, whether section 211(k) of the Clean Air Act Amendments allows the Reformulated Fuels Program to account for the capacity of ethanol to reduce emissions of ozone-forming carbon monoxide. If asked to address this question as an Assistant Attorney General, I would want to bring to it an open and receptive mind, able to benefit from the research and analysis that OLC's staff would provide. I would not want to have committed myself in advance to a particular outcome. I appreciate the importance of this issue for the administration of the Clean Air Act and would treat it with the seriousness that it deserves.

2. My question to you is this: Do you plan to publicize legal opinions rendered by the Office of Legal Counsel when two or more executive agencies disagree as to the meaning of legislation or regulations? If not, why not?

In response to Question 7 of Senator Grassley, I have addressed the more general issue of releasing various categories of OLC opinions. My answer to that question, which notes that I will need to review this issue if I am confirmed, states my commitment to openness but identifies considerations that may weigh against the disclosure of some types of opinions. Under the considerations set out in my answer to Senator Grassley's question, OLC legal opinions resolving disputes between agencies are among those most likely to warrant release. Of course, there will be exceptions. For example, an opinion resolving a legal dispute between two agencies over an operation classified under the national security laws could not be publicly disclosed. But on the spectrum of opinions, the resolution of inter-agency disputes is likely to present among the strongest claims for disclosure.



## QUESTIONS FROM SENATORS PRESSLER, GRASSLEY AND BROWN

1. Does the legislative intent of 42 USC 7545 Section 211(k) preclude a reactivity adjustment to the "mass" of VOC emissions, when such adjustment results in a decreased ozone forming, e.g. cleaner, reformulated gasoline than would otherwise be possible absent said adjustment?

See answer to Senator Pressler's question number 1.

2. Does the legislative intent of Section 211(k) provide the legal basis to preclude the greatest ozone reductions possible by discriminating against usage of alcohols in reformulated gasolines?

See answer to Senator Pressler's question number 1.

3. In determining the hazardous nature of ozone forming VOC's, must all emissions contributing to ozone formation, including harmful carbon monoxide, be considered?

See answer to Senator Pressler's question number 1.

## QUESTIONS FROM SENATOR GRASSLEY

Note: Some questions ask for my personal judgment on specific legal issues that may well come before the Office of Legal Counsel in the discharge of its statutory responsibilities. As I testified yesterday, it is essential that OLC maintain the ability to render independent, objective and unbiased legal advice in the discharge of those responsibilities. With that in mind, I wish to avoid committing myself to specific legal conclusions on such issues. As a separate consideration, I would not want to render any definitive and considered legal judgment without first thoroughly researching, analyzing and consulting with OLC staff. Within these constraints, I have endeavored to indicate what considerations generally guide my approach to the questions posed, as well as to amplify upon prior statements of mine, when asked to do so.

1. I would like to ask your opinion about the speech and debate clause and separation of powers. My colleagues have used these two constitutional doctrines to argue against Congress falling within the provisions of a whole host of laws -- from civil rights to occupational health and safety. What is your view regarding Separation of Powers and the Speech and Debate Clause? Do these doctrines preclude congressional coverage?

Do they prohibit courts from determining or reviewing whether a member of congress has violated particular employment and labor laws?

The constitutionality of applying any particular civil rights, occupational health and safety, or other employment statute to Members of Congress would depend upon the details of the particular statute and the manner in which it is to be applied. In some cases, the Speech or Debate Clause and/or the doctrine of separation of powers might preclude Congress from applying a law to Members of Congress and their staffs or preclude courts from enforcing such a law; in others there would be no constitutional problem. In each case, I would examine the statute in light of relevant Supreme Court and other judicial precedent, as well as any prior OLC opinions on these issues.

For example, the Speech or Debate Clause provides that "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." U.S. Const. art. I, § 6. Although courts have construed the Clause broadly and have held that it protects more than pure speech or debate, the Supreme Court has said that the Clause does not immunize Members of Congress or their staffs from prosecution where the Government's case "does not rely on legislative acts or the motivation for legislative acts." United States v. Brewster, 408 U.S. 501, 512 (1972). The Court has explained that

## Responses to Senator Grassley's Questions

application of the Clause turns on whether the challenged conduct falls within the "sphere of legitimate legislative activity." Tenney v. Brandhove, 341 U.S. 367, 376 (1951). As prior OLC opinions have recognized, not all acts performed in an official legislative capacity are "legislative" for purposes of the Clause; matters other than speech or debate in either House "must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." Gravel v. United States, 408 U.S. 606, 625 (1972). Thus, whether the application of a particular statute to Congress would potentially violate the Speech or Debate Clause would depend upon whether the statute covered "legislative" conduct as that term has been construed by the courts and by OLC in the past. If not, then no Speech or Debate Clause issue would be presented, and, as Assistant Attorney General John M. Harmon explained in an OLC opinion issued in January, 1981, Congress could authorize the other branches to "prosecute and punish its members."

2. In 1988, in The New York Times, you called President Bush "lawless" for criticizing Governor Dukakis' veto of a Massachusetts bill requiring teachers to lead the Pledge of Allegiance. Governor Dukakis tried to justify his veto based on the state's highest court issuing an advisory opinion that the bill was unconstitutional.

Your op-ed piece noted that the state court decision was based on First Amendment case law, and that Governor Dukakis cited his oath to uphold the U.S. Constitution in vetoing the bill. You indicated that anyone committed to the rule of law would have done the same, particularly where the court had ruled that the particular bill was unconstitutional.

But this analysis puzzles me. Certainly, requiring teachers to lead the Pledge of Allegiance is different from requiring students to say it. Governor Dukakis could not be sure that the U.S. Supreme Court would find the bill unconstitutional. A state court's interpretation of the federal constitution is binding on no one, even if the ruling applies to the very statute before a governor. Governor Dukakis had a choice, and he chose to veto. Would you automatically consider it "lawless" for President Clinton to sign a federal statute that a state court had ruled in an advisory opinion was a violation of federal constitution?



## Responses to Senator Grassley's Questions

Governor Dukakis vetoed a Massachusetts bill requiring teachers to lead the Pledge of Allegiance in class after the Massachusetts Supreme Judicial Court rendered an advisory opinion that the bill would violate the First Amendment of the United States Constitution, as applied to the states through incorporation in the Fourteenth Amendment. See *Opinions of the Justices to the Governor*, 363 N.E.2d 251 (Mass. 1977). I wrote that it would have been irresponsible in that circumstance for a governor not to veto the bill. As the Massachusetts court concluded, the bill would have authorized severe penalties for disobedience including the imposition of criminal fines and discipline or discharge. I pointed out that the only practical effect of approving the bill would have been to force "teachers to bear the needless expense of pursuing appeals to a state Supreme Court that had already and emphatically pronounced the legislation invalid." In such appeals, of course, the state court's judgment about the meaning of the First Amendment would be binding on state officials, subject only to the possibility of review by the United States Supreme Court. As a more general matter, in those states that authorize the governor or legislature to seek advisory opinions from the state supreme court, the very purpose of doing so is to obtain authoritative legal advice from the court and thus to avoid the enactment of legislation that the court would invalidate.

3. Article I of the Constitution prohibits a member of Congress "during the time for which he was elected" from being "appointed to any civil office ... the emoluments whereof shall have been increased during such time ..." when then-Senator Bentsen was nominated to be Treasury Secretary, I co-sponsored legislation to lower the salary for that position to the level it had been when Senator Bentsen's term began. However, the Office of Legal Counsel issued an opinion in 1987 stating that legislation could not solve the constitutional difficulty, and that once the salary is raised, a member is barred from the appointment for the rest of his or her term. Do you agree with the Justice Department analysis that appointments such as Secretary Bentsen's are unconstitutional, or do you believe that legislation lowering the salary can satisfy the Constitution?

Several other members of Congress were also appointed to the cabinet: Director Panetta, and Secretaries Aspin and Espy. Unlike Secretary Bentsen, these cabinet members took office before any salary increase during their current congressional term. However, cost of living adjustments may well take effect before January 3, 1995, when the term for which they were elected expires. Does the Emoluments Clause have any application to this situation? Do we have a

## Responses to Senator Grassley's Questions

prevent any increase in those salaries, and if so, will the administration offer such legislation?

Although I am not familiar with the 1987 OLC opinion cited in Senator Grassley's question, I used the application of the Emoluments Clause as a case study to begin my class in Constitutional Law for several years. As a result, I have formed an opinion about the application of this relatively obscure provision of the Constitution to situations in which a previously increased salary is lowered to enable a member of Congress to accept executive appointment.

In my view, legislation that lowers the salary for a position to the level it had been when the term of the member of Congress began is fully effective under the Constitution to remove the barrier of the Emoluments Clause. (I have not had occasion to consider the additional wrinkle involving a previously enacted cost-of-living adjustment.)

4. You have criticized the Supreme Court's leading establishment clause decision, Lemon v. Kurtzman, as laying out too much of a formula. You have praised the "endorsement" of religion test instead. Do you believe that Lemon v. Kurtzman should be overturned?

In a Washington Post article, Say Amen or Else--Piety And the Law, November 3, 1991, I agreed with the position taken by Justice O'Connor that government actions that "show favoritism to particular beliefs or convey a message of disapproval to others" do not "adequately protect the religious liberty" of our people. I also agreed with Justice O'Connor that a key issue in Establishment Clause cases is whether there has been "governmental endorsement or disapproval of religion."

In its June 7, 1993 Lamb's Chapel v. Center Moriches Union Free School District opinion, No. 91-2024 at 10 (U.S. June 7, 1993), the Supreme Court applied the three-prong Lemon test. Despite my skepticism of formulaic methods of analysis, see The Sound of Silence: An Epistle on Prayer and the Constitution, 95 Yale L.J. 1631, 1637 n.27 (1986), the fact remains that the Lemon test still plays an important role in Establishment Clause jurisprudence. Any reconsideration of that test would have to take into account the importance of the doctrine of stare decisis.

## Responses to Senator Grassley's Questions

5. Have you discussed the role of the Office of Legal Counsel with anyone in the White House? With whom (White House Counsel Nussbaum, the President, the First Lady), and what has been the nature and substance of those discussions?

I do not recall participating in any discussions concerning the role of the Office of Legal Counsel with anyone in the White House other than one or two brief and general conversations about whether I would be willing to be nominated for this position. As I recall, Bernard Nussbaum expressed his view that heading OLC is a very important position, and that my background made me highly qualified for the office, and he urged me to consider being nominated.

6. Although your predecessor reported to the Deputy Attorney General, if confirmed, you will report to Associate Attorney General Webb Hubbell. Mr. Hubbell, I understand, has an office next to the Attorney General, in the space where the head of OLC used to be. Were you consulted about these moves and changes, and how will you insure that OLC's independence will not be compromised by your superiors in the department?

I have been consulted both about office space allocation and the organizational structure for the Department. I have the complete assurance of Attorney General Reno that the tradition of OLC independence will be respected and maintained.

7. What will be your policy regarding making OLC opinions available to the public?

If confirmed, I intend to review the question of OLC policies regarding release of opinions. Attorney General Reno is strongly committed to a basic policy of openness in government, and I share that commitment. Openness promotes public confidence that the government is making its decisions through a process of careful and thoughtful reasoning. At the same time, I recognize that, in some types of cases, there are considerations weighing against the release of opinions. Some categories of documents, such as opinions on matters classified for reasons of national security, are especially sensitive. In addition, opinions may reflect legal advice given as part of the government's deliberative process, and protection of some of these opinions may be necessary to ensure that decisionmakers are willing to seek candid legal advice before they act. Opinions resolving inter-agency disputes are likely to be strong candidates for disclosure. Although government decisionmaking requires a certain measure of confidentiality, the government should not reflexively seek secrecy.



## Responses to Senator Grassley's Questions

8. In 1989, you told this committee that "[i]t is, of course, common sense, basic constitutional law that Congress may not by statute 'overturn' a constitutionally based decision of the U.S. Supreme Court."

Many members of Congress believe otherwise, basing such action on the Supremacy Clause or the negative Commerce Clause that restricts state power. And two pieces of pending legislation, the Freedom of Choice Act and the Religious Freedom Restoration Act, are designed to overturn Supreme Court decisions in the Webster and Casey and Employment Division v. Smith cases. Precision is important in OLC legal opinions, so I would ask you whether you might want to modify your earlier statement to the committee.

In my 1989 testimony before the Judiciary Committee, I was asked whether Congress has the authority to overrule by statute the Supreme Court's interpretation of the United States Constitution, and I answered that Congress may not do so. I continue to believe that Congress cannot change the Supreme Court's interpretation of the Constitution. I went on to note that Congress may, in response to a Supreme Court decision, "correct any flaw that may have rendered an act of Congress unconstitutional." When Congress attempts to make such a correction, it does not "overrule" the Supreme Court's decision; instead, Congress enacts a new law bringing its legislation into conformity with the Court's interpretation of the Constitution.

The Freedom of Choice Act does not seek to "overrule" the constitutional holdings of any prior Supreme Court decisions concerning the interpretation of the Fourteenth Amendment's Due Process Clause. If enacted, the bill would provide federal statutory protection for certain liberty interests that the Supreme Court has held are not so fundamental that state regulation of them must be subject to strict judicial scrutiny. Such a law, if valid, would not "overrule" any prior Supreme Court interpretation of the Constitution, but would operate to preempt contrary state regulations under the Supremacy Clause.

9. I don't believe that any administration, including the Carter administration, has accepted the constitutionality of the War Powers Act. Do you believe the War Powers Act to be constitutional?

The War Powers Resolution raises fundamental issues about the relationship of executive and legislative power. Although no administration, to my knowledge, has objected to the facial constitutionality of the consultation or reporting requirements, other provisions have been the subject of much constitutional

## Responses to Senator Grassley's Questions

debate. Although I have thought about the issues raised by these other provisions, I have not reached any final conclusions about their constitutionality. I would want to do so only after the most serious consideration. These may be, after all, literally questions of life or death. President Clinton has expressed his desire to re-think issues under the War Powers Resolution. On March 31, for example, he wrote to Congressman Gonzalez that "[w]e will be reviewing the complex issues related to the War Powers Act in close consultation with key members of Congress." If confirmed, I would welcome taking part in that process.

10. Do you believe that the Independent Counsel Act should be extended to Congress?

I have had no occasion to consider whether it would or would not be desirable to extend the independent counsel provisions of the Ethics in Government Act.

11. Do you believe that City of Richmond v. Croson was decided correctly as an original matter?

Over the years I have often reflected on the constitutionality of racial classifications that are adopted as affirmative action measures, and believe that courts should apply some form of heightened judicial scrutiny to such classifications. I have not, however, reached a conclusion as to whether City of Richmond v. J.A. Croson Co. was correctly decided.

Croson sets forth the controlling standards for evaluating the constitutionality of affirmative action measures adopted by state and local governments. Under Croson, state and local governments may not give preferential treatment to minority contractors on the basis of their race except as a remedy for racial discrimination in the state or local contracting process or construction industry.

12. OLC in the Bush administration issued an opinion as to the FBI's authority to make extraterritorial arrests. Do you believe that opinion is legally correct?

In 1989 OLC issued an opinion concluding that the FBI is legally authorized to investigate and arrest individuals for violations of United States law even if those investigations and arrests are not consistent with international law. See Authority of the Federal Bureau of Investigation to Override Customary or other International Law in the Course of Extraterritorial Law Enforcement Activities, 13 Op. O.L.C. 195. The Supreme Court held last term in United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992), that the extradition treaty between Mexico and the

## Responses to Senator Grassley's Questions

United States does not prohibit either country from abducting citizens of the other suspected of a crime, and that a criminal defendant abducted to the United States due to the efforts of DEA agents could be tried in federal court for violations of U.S. criminal law. Although the Court's opinion focuses primarily on an issue not raised in the OLC opinion, the Court opinion also supports OLC's view that abduction is legally permissible in some circumstances even if it violates customary international law.

I have not studied this issue in detail. However, I understand that Attorney General Reno has ordered a Justice Department review of the policy on the FBI's "snatch" authority. If she asks OLC to revisit the underlying legal question, I would re-examine any issues decided by the 1989 opinion that have not been conclusively resolved by the Supreme Court's opinion in Alvarez-Machain.

13. In a 1988 book review, you indicated that "many of the Civil Rights and Civil Liberties policies of [the Reagan] administration are both regressive and constitutionally unsound." Which policies were you referring to?

The policies to which I was referring were those underlying the government's decision to reverse course in the Bob Jones litigation and the decision to urge the Court's overruling of Roe. With respect to Bob Jones, I criticized the government's position that the IRS had no statutory authority to deny tax-exempt status to racially discriminatory schools. In light of my belief that "[n]o commitment is so firmly rooted in national policy as that of ending racially segregated education," I found such a theory untenable. I also criticized the government's decision to seek reversal of Roe less than two years after the Court had specifically chosen not to overrule that decision.



## QUESTIONS FROM SENATOR HATCH

Note: Some questions ask for my personal judgment on specific legal issues that may well come before the Office of Legal Counsel in the discharge of its statutory responsibilities. As I testified yesterday, it is essential that the office maintain the ability to render independent, objective and unbiased legal advice in the discharge of those responsibilities. With that in mind, I wish to avoid committing myself to specific legal conclusions on such issues. As a separate consideration, I would not want to render any definitive and considered legal judgment without first thoroughly researching, analyzing and consulting with OLC staff. Within these constraints, I have endeavored to indicate what considerations generally guide my approach to the questions posed, as well as to amplify upon prior statements of mine, when asked to do so.

1. a. In your article discussing the work of the North Carolina Criminal Code Commission, you describe a Commission proposal to "forbid the seizure of 'personal diaries, letters, or other private writings or recordings' not used to further a criminal enterprise." You state that this proposal "reflected a determination that admission at trial of 'purely' private writings such as diaries or intra-family letters would be constitutionally doubtful under the self-incrimination clause of the fifth amendment." 10 Wake Forest L. Rev. at 367-368 (1974). Was this determination of dubious constitutionality your determination?

The Commission's belief that the admission at trial of "purely private writings" was constitutionally doubtful was based on a then-recent decision written by the chief judge of the United States Court of Appeals with jurisdiction in North Carolina. See Hayden v. Warden, 363 F. 2d 647, 657-58 (4th Cir. 1966) (Haynsworth, C.J.), rev'd on other grounds, 387 U.S. 294 (1967), cited in North Carolina Criminal Code Commission, Legislative Program and Report 196 (Jan. 31, 1973).

- b. In that same article, you discuss another Commission proposal -- which was also rejected by the state legislature -- that would have required police officers to give a form warning before obtaining consent to search. Did you support this provision? If so, did you believe it to be constitutionally mandated?

I do not recall my views on the proposal to require police officers to give a specific warning before undertaking a warrantless search with consent.

## Responses to Senator Hatch's Questions

2. In 1987 OLC rendered an opinion that the federal government could design a voucher program under which parents could redeem their vouchers at religious as well as secular private elementary and high schools. (11 OLC 18 (1987).) You yourself have espoused a "neutrality" test for the Establishment Clause in which, in your words, the "key factor . . . is the dispositive role of private citizen choice." ("The Sound of Silence" An Epistle on Prayer and the Constitution," 95 Yale L.J. 1631, 1639 (1986).) Given the dispositive role that private citizen choice plays in the allocation of funds under a voucher system, would you agree that a voucher system that included both religious and secular private elementary and high schools should properly be ruled constitutional by the Supreme court?

As I stated to the Committee yesterday, I believe that there is some tension among the decisions of the Supreme Court in this area. In School District of the City of Grand Rapids v. Ball, 473 U.S. 373 (1985), the Court disapproved the use of public employees to provide remedial and enrichment courses in nonpublic, sectarian schools. Most recently, the Court held that a state's provision of a deaf interpreter in a nonpublic sectarian school, did not violate the Establishment Clause. Zobrest v. Catalina Foothills School District, No. 92-94 (U.S. June 18, 1993).

In 1987, OLC had occasion to offer an opinion on the constitutionality of a draft of the proposed Education Consolidation and Improvement Act of 1987. 11 Op. O.L.C. 18 (1987). It was the position of OLC then that that proposal was, at least facially, constitutional. However, the opinion also raised the possibility of unconstitutional application and recognized the "extraordinarily tangled area of the law" under discussion. 11 Op. O.L.C. at 19.

I have previously addressed the wisdom of utilizing a "neutrality" test for Establishment Clause analysis. I continue to believe in its merit. While I do not have an opinion on the constitutionality of the hypothetical statute mentioned in your question, OLC would carefully consider the issues raised by any proposed legislation.

3. As you know, federal law now provides for a death penalty for certain kinds of murderers engaged in drug enterprises. For years, crime bills pending in Congress would have added to the number of federal crimes punishable by death. You have argued that the death penalty as applied in this country is unconstitutional. (See 26 Am. Crim. L. Rev. 1726 (1989).) Will you advise the President and Attorney General

## Responses to Senator Hatch's Questions

that current federal law or the pending bills in Congress are unconstitutional?

As I wrote in my article in the American Criminal Law Review, I do not believe that death penalty laws are inherently unconstitutional. In any event, my views on the death penalty will not be controlling when it comes to advising the President or Attorney General on the constitutionality of death penalty laws. In providing that advice, I will be guided by Supreme Court precedent on the death penalty.

4. In McCleskey v. Kemp (1987), the Supreme Court held that racial disparities in sentencing statistics could not, absent any evidence of discriminatory intent in a particular case, preclude imposition of death penalty. Do you agree or disagree with the McCleskey v. Kemp decision?

Although I believe that it is important to protect against racial bias in the imposition of the death penalty, I have not analyzed the opinions and the underlying evidence in McCleskey with sufficient care to have an opinion on whether there was sufficient evidence of discriminatory intent in that case.

5. Do you believe that Washington v. Davis was correctly decided?

Yes.

6. a. Do you believe that the category of "fundamental rights" the Court has held to be protected by the Equal Protection Clause ought to be expanded?

I do not think that the Supreme Court should "expand" or "contract" the category of fundamental rights protected by the Equal Protection Clause. In my view, the Court's task and its obligation is to interpret and apply the meaning of the Clause in accordance with text and original meaning and with due respect for precedent and tradition.

- b. Do you believe that wealth-based classifications with a disparate impact on the poor should be subjected to a higher degree of constitutional scrutiny?

While some wealth-based classifications are subject to heightened judicial scrutiny, see, e.g., Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966), I have concluded that San Antonio Independent School Board v. Rodriguez, 411 U.S. 1 (1973), was correctly decided and that decisions concerning public finances generally present complex questions unsuited for constitutional adjudication in the federal courts.



## Responses to Senator Hatch's Questions

7. 1a. Do you agree with the Supreme Court's holding in Croson v. City of Richmond that all racial discrimination by government, including discrimination against whites as well as discrimination against racial minorities, is to be judged by the same standard of strict scrutiny under the Equal Protection Clause?

Although over the years I have often reflected on the constitutionality of racial classifications that are adopted as affirmative action measures, and believe that courts should apply some form of heightened judicial scrutiny to such classifications, I have not reached a conclusion as to whether City of Richmond v. J.A. Croson Co. was correctly decided. I do recognize, however, that Croson sets forth the controlling standards for evaluating the constitutionality of affirmative action measures adopted by state and local governments.

Under Croson, state and local governments may not give preferential treatment to minority contractors on the basis of their race except as a remedy for racial discrimination in the state or local contracting process or construction industry.

- b. When, if ever, should a State be able to give preferential treatment to a class of contractors on the basis of race other than to remedy past discrimination in the state contracting process?

See answer to question 7.a.

8. In Harris v. McRae (1980), the Supreme Court upheld the constitutionality of the Hyde Amendment, which forbids federal funding of abortions. Do you think Harris v. McRae was correctly decided?

No. Harris v. McRae is, however, settled law and will be applied by the Office of Legal Counsel where relevant to issues that come before the office.

9. There have been some press reports that the Clinton administration is using persons and groups outside the administration to screen potential executive branch and judicial nominees.

- a. During the process by which the administration selected you, did you ever provide information to or meet with outside persons acting on behalf of the administration?

No.

Responses to Senator Hatch's Questions

b. If so, who were they?

N/A

c. What did they ask you?

N/A

d. What information did you give them?

N/A

10. According to your questionnaire response, you have been acting as a "consultant" at the Justice Department since May 2, 1993. Prior to that, from February 2, 1993 to April 30, 1993, you were an associate counsel at the White House.

a. Either before or during your service in the administration, have you had any involvement with the administration's selection process for any executive branch or judicial position, other than your own?

Yes.

b. If so, what was the position, and what was your role?

I interviewed persons being considered for appointment as Attorney General, and I informally suggested the names of persons I thought should be considered for other Justice Department positions.

11. a. Are you aware of the Administration's use of any persons or groups outside the administration, including lawyers, to "vet" or otherwise screen potential judicial or executive branch nominees?

I have no information concerning the use of outside persons to screen potential judicial or executive nominees, except that I was aware of some of the lawyers who assisted in interviewing prospective nominees for Attorney General.

b. If so, who are these persons?

I have no information concerning the use of outside persons to screen potential judicial or executive nominees, except that I was aware of some of the lawyers who assisted in interviewing prospective nominees for Attorney General.

c. With which firms or groups are they associated?

Responses to Senator Hatch's Questions

I have no information concerning the use of outside persons to screen potential judicial or executive nominees, except that I was aware of some of the lawyers who assisted in interviewing prospective nominees for Attorney General.

d. What kind of control did the administration exercise over these persons?

I have no information concerning the use of outside persons to screen potential judicial or executive nominees, except that I was aware of some of the lawyers who assisted in interviewing prospective nominees for Attorney General.

e. What kind of information about potential nominees did the administration provide these persons?

I have no information concerning the use of outside persons to screen potential judicial or executive nominees, except that I was aware of some of the lawyers who assisted in interviewing prospective nominees for Attorney General.

f. What have these outside persons been doing in this process?

I have no information concerning the use of outside persons to screen potential judicial or executive nominees, except that I was aware of some of the lawyers who assisted in interviewing prospective nominees for Attorney General.

g. Have these outside persons interviewed prospective nominees?

I have no information concerning the use of outside persons to screen potential judicial or executive nominees, except that I was aware of some of the lawyers who assisted in interviewing prospective nominees for Attorney General.

h. Has the administration taken any precautions to ensure that these persons do not have a conflict of interest?

I have no information concerning the use of outside persons to screen potential judicial or executive nominees, except that I was aware of some of the lawyers who assisted in interviewing prospective nominees for Attorney General.

i. Have these outside persons been compensated for their services?

I have no information concerning the use of outside persons to screen potential judicial or executive nominees, except that I



## Responses to Senator Hatch's Questions

was aware of some of the lawyers who assisted in interviewing prospective nominees for Attorney General.

12. Under what circumstances, if any, does the Constitution permit the federal government to require the "race norming" of test scores?

This is a question I have not had occasion to consider, and on which I have no opinion.

June 29, 1993

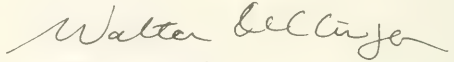
## BY HAND DELIVERY

The Honorable Orrin Hatch  
United States Senate  
Washington, DC 20510-6275

Dear Senator Hatch:

I am pleased to respond to the additional questions you submitted to me yesterday. If I can provide any further information please do not hesitate to contact me at 514-2041.

Sincerely,



Walter Dellinger

✓ cc: Senator Joseph Biden

Attn: Cathy Russell

ANSWERS TO SUPPLEMENTAL WRITTEN QUESTIONS FROM SENATOR HATCH

1. In McCleskey v. Kemp (1987), the Supreme Court ruled that racial disparities in sentencing statistics could not, absent any evidence of discriminatory intent in a particular case, preclude imposition of the death penalty. Do you agree or disagree with the McCleskey v. Kemp ruling?

In my previous submission, I thought that I answered this question fully and honestly. As I recall McCleskey (which I have not read in some time, and have never studied with any care) it is a very complex case. As I stated, "Although I believe that it is important to protect against racial bias in the imposition of the death penalty, I have not analyzed the opinions and the underlying evidence in McCleskey with sufficient care to have an opinion on whether there was sufficient evidence of discriminatory intent in that case."

Please note that in responding to the first set of questions, I stated my views about cases in every instance in which I had written about or studied the case and had arrived at a conclusion about whether it was or was not correctly decided. (See, for example, question 5 from Senator Hatch and my response: "Do you believe that Washington v. Davis was correctly decided?" "Yes." ) There are, however, many prominent cases that I have read (or the results of which I am aware of) but with respect to which I would have to give careful study and reflection before coming to a considered judgment of my own as to whether the majority or the dissent (or some alternative approach) represented the best legal or constitutional conclusion. I not believe that it would be appropriate for me to provide a conclusion about a case or a constitutional issue when I have not reached one.

2. a. The Supreme Court has identified certain "fundamental rights" protected by the Equal Protection Clause. In addition to those rights currently recognized as "fundamental" under Supreme Court precedent, are there any other rights that you believe should be classified as "fundamental"?

There are no other rights that I have concluded should be classified as "fundamental".

b. The Supreme Court has identified certain classifications as "suspect" for purposes of scrutiny under the Equal Protection Clause. In addition to those classifications currently recognized as "suspect" under Supreme Court precedent, are there any other classifications that you believe should be regarded as "suspect"?

There are no other classifications that I have concluded should be regarded as "suspect".



c. Are there any other rights or classifications that you believe should invite a level of review under the Equal Protection Clause that is less deferential than "rational basis" review (as "rational basis" review is currently construed and applied)?

There are no other rights or classifications that I have concluded should be provided a less deferential standard of judicial review.

3. You have stated that you were "aware of some of the [outside] lawyers who assisted in interviewing prospective nominees for Attorney General."

a. Who were these persons?

b. With which firms or groups were they associated?

c. What kind of control did the administration exercise over these persons?

d. What kind of information about potential nominees did the administration provide these persons?

e. What did these outside persons do in this process?

f. Did these outside persons interview prospective nominees?

g. Did the administration take any precautions to ensure that these persons did not have a conflict of interest?

h. Were these outside persons compensated for their services?

I have almost no information of any consequence about this process. Because I was serving in the White House, I do happen to be aware of the names of three or four of the lawyers who "vetted" prospective nominees for Attorney General. Any decision to release information about the process by which the President of the United States reviewed and evaluated prospective appointees to his cabinet should be made either by the Counsel to the President or by the President himself.

June 29, 1993

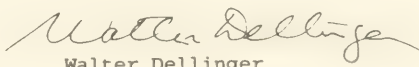
**BY HAND DELIVERY**

The Honorable Alan K. Simpson  
United States Senate  
Washington, DC 20510-6275

Dear Senator Simpson:

I am pleased to respond to the questions you submitted to me yesterday. If I can provide any further information please do not hesitate to contact me at 514-2041.

Sincerely,

A handwritten signature in cursive script, reading "Walter Dellinger". The signature is fluid and extends to the right.

Walter Dellinger

cc: Senator Joseph Biden

## QUESTIONS FROM SENATOR ALAN K. SIMPSON

1. Does the legislative intent of 42 U.S.C. 7545 Section 211(k) preclude a reactivity adjustment to the "mass" of volatile organic compound emissions, when such adjustment results in a decreased ozone forming, e.g., cleaner, reformulated gasoline than would otherwise be possible absent said adjustment?
2. Does the legislative intent of Section 211(k), provide the legal basis to preclude the greatest ozone reductions possible by discriminating against usage of alcohols in reformulated gasolines?
3. In determining the hazardous nature of ozone forming volatile organic compound emissions, must all emissions contributing to ozone formation, including harmful carbon monoxide, be considered?

OLC's responsibilities include answering requests for legal advice from the heads of Executive Branch agencies and resolving inter-agency legal disputes referred to the Office. If I am confirmed, and if OLC were to receive an appropriate request or referral from an Executive Branch agency concerning the interpretation of the Clean Air Act, I would study the issue and prepare an opinion. The June 11 letter from you and Senators Grassley and Brown discusses, in some detail, whether section 211(k) of the Clean Air Act Amendments allows the Reformulated Fuels Program to account for the capacity of ethanol to reduce emissions of ozone-forming carbon monoxide. If asked to address this question as an Assistant Attorney General, I would want to bring to it an open and receptive mind, able to benefit from the research and analysis that OLC's staff would provide. I would not want to have committed myself in advance to a particular outcome. I appreciate the importance of this issue for the administration of the Clean Air Act and would treat it with the seriousness that it deserves.



## HAITIAN COURT DECISION

4. This administration has not yet decided whether to appeal the recent federal court decision to bring the HIV-infected Haitians into the United States for processing. The decision sets a significant precedent, as it provides constitutional guarantees to aliens outside the U.S.

Under such a precedent, U.S. consulates abroad could be required to provide protection and processing of aliens seeking visas or political asylum, including numerous appeals and the right to an attorney. Military bases and other places where the U.S. has a presence could be asked to take in asylum seekers.

The Administration has already decided not to ask the Court for a delay in the entry of these Haitians, even though in the past all requests for a delay in the entry of these Haitians has been granted.

The Supreme Court ruled yesterday, in an 8 to 1 decision, that the return of Haitians interdicted outside of the United States is appropriate, since the ban on returning "refugees" applies only to aliens applying from within the United States.

In your opinion, what is the impact of this recent decision, Sale v. Haitian Centers Council, Inc., on Judge Johnson's decision?

In your opinion, does the recent Supreme Court decision directly overturn Judge Johnson's decision, thus eliminating the need to appeal it? If not, why not?

If the Supreme Court decision does not effect Judge Johnson's decision will you advise the Solicitor General's office to appeal it? If you advise him to appeal the decision, will you advise him to appeal the entire decision or just part of the decision? If only part, which issues would you recommend be appealed?

I have not read the Supreme Court's opinion in Sale v. Haitian Centers Council, Inc. Consequently, I do not have an opinion as to the impact of this decision on the District Court's ruling. This matter lies within the purview of the Solicitor General's Office and I do not presently have any plan to advise the Solicitor General on this matter.



U.S. Department of Justice  
Office of Legal Counsel

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Washington D.C. 20530

July 14, 1993

BY HAND DELIVERY

The Honorable Jesse Helms  
United States Senate  
Washington, DC 20510-6275

Dear Senator Helms:

I am pleased to respond to the questions you submitted to me. If I can provide any further information please do not hesitate to contact me at 514-2041. I would be pleased to meet with you at any time to discuss any concerns you may have and to discuss my plans, if confirmed by the Senate, for the Office of Legal Counsel.

Sincerely,

  
Walter Dellinger

cc: Senator Joseph Biden ✓  
Senator Orrin Hatch

**RESPONSES TO  
QUESTIONS FROM SENATOR JESSE HELMS**

1. The news media reported that you drafted President Clinton's executive orders lifting various restrictions on abortion. Are these reports accurate?

Yes.

2. Did you help draft President Clinton's Executive Order overturning the ban on homosexuals in the military, or otherwise take any part in the President's decision to issue such an order?

I was not involved in the President's decision to instruct the Secretary of Defense to review current policy concerning homosexuals in the military. As far as I know, that review has not been completed and no order has been issued. Before joining the Justice Department, as Associate White House Counsel I worked with the Department of Justice in efforts to avoid any judicial decisions that would disrupt or pre-empt the interim process that had been agreed to by the President and relevant Senate leaders on February 3, 1993. I coordinated that effort with the Senate staff with principal responsibility for armed services matters.

3. What are your views concerning the ban on homosexuals serving in the military?

I will adhere to any policy adopted by the President and the Congress. My own personal view is that the fact of sexual orientation or status should not preclude military service except in circumstances in which military effectiveness, morale or unit cohesion would be adversely affected.

4. Does the Constitution of the United States give Congress the specific and full power to make rules for the government and regulation of the land and naval forces?

Yes. See U.S. Const., Article I, Section 8, Clause 14.

5. On what legal authority do you believe a President, without specific authorization from Congress, may lift the ban on homosexuals serving in the military?

As Chief Executive and Commander in Chief, the President, and by his authority the Secretary of Defense and military commanders, have broad authority to regulate military service. (Such executive authority is, for example, the legal



basis for the existing ban.) Congress may, of course, override executive orders by valid legislation.

6. Please furnish an account of the full extent of your participation in the confirmation proceedings for Supreme Court nominees Chief Justice Rehnquist, Judge Robert Bork and Justice Clarence Thomas.

A. The Confirmation of Chief Justice Rehnquist. I briefed the Democratic Members of the Senate Judiciary Committee on the original understanding of the Advice and Consent Clause of the Constitution.

B. The Confirmation of Judge Bork. I briefed the Chairman of the Senate Judiciary Committee on the original understanding of the Advice and Consent Clause and on the nominee's writings, and I reviewed a report and analysis of those writings. My principal participation was as a witness at the Hearings.

C. The Confirmation of Justice Thomas. I participated in one briefing of the Chairman of the Judiciary Committee on natural law. I was not otherwise involved.

7. During any of these proceedings, did you receive compensation in any form from any person or entity?

No.

If so, please list all such compensation, the entities and/or persons providing the compensation and the terms of such compensation.

N/A

8. During any of these proceedings, did other employees and/or students of Duke University assist you and/or the Judiciary Committee; if so, what person and/or entity, if any, paid for their services?

I do not recall using any student research assistance in these matters. Although I have no specific recollection of using any other university employees, I would assume that I used the normal secretarial assistance provided by Duke University for the professional activities of law school faculty members.

9. Did you lend your name to any fund-raising appeals or advertisements opposing the confirmation of Judge Bork or Justice Thomas? If so, please furnish copies of those advertisements.

I do not recall using my name in any such advertisements.

10. Please list all Senators to whom you provided advice and/or assistance during confirmation proceedings of Chief Justice Rehnquist, Justice Thomas and Judge Bork.

My best recollection would be: Senator Sanford, Senator Mitchell, Senator Biden, Senator Kennedy, Senator DeConcini, Senator Simon, Senator Leahy, and Senator Heflin.

11. Will you provide copies of all memoranda provided by you to members of the Judiciary Committee concerning the nominations of Chief Justice Rehnquist, Justice Thomas and Judge Bork?

A memorandum I wrote for Senator Biden concerning the original understanding of the Advice and Consent Clause was published in the Congressional Record for September 11, 1986. A copy is attached for your convenience. I do not understand the question to include confidential legal analysis provided to a Senator that was not intended for public distribution.

12. Have you ever failed to make timely Social Security payments related to the employment of domestic help, or for any other individual for whom the law requires such payments be made, and if any payments were late, please indicate the date on which such payments were made, and the period by such payments.

In January I submitted \$911 to IRS for FICA taxes for 1988-92 that may or may not have been owed.

13. If you failed to make timely Social Security payments, please describe any distinction between your conduct in this respect and that of Ms. Zoe Baird and Judge Kimba Wood.

I do not have sufficient information to presume to comment on any other taxpayer. My own record is as follows. Since 1969 we have had a series of four persons work in our house, generally part time. I made sure that each one was signed up with social security, and I regularly paid both the employers' and employees' share of social security taxes.

The \$911 payment I made in January was for the account of an elderly person who worked for my family for years (and for whom I regularly made timely social security payments). In recent years I have not considered her an employee for FICA purposes. (The money I give her (\$25 or \$30 a week) is not dependent upon her providing any services and is basically intended to supplement her retirement income.) Nonetheless, just

to be conservative, I made the \$911 payment and included with it \$269 for interest and a late fee of \$233.

14. If you indeed failed to make timely Social Security payments, who advised you -- and when were you advised -- of the need to make such payments?

I have never been advised of the need to make such payments.

15. Newspapers have reported that, in addition to the salary you were paid last year by Duke University, you received in excess of \$100,000 for "outside consulting services." Please identify all entities and the amounts they paid you for "consulting services" for the years 1990 to present.

My readily available records go back to 1985 and show the following amounts I have received for outside consulting services as well as the entities and amounts paid. I have also included the matters for which I was compensated.

1985: None

1986: None

1987: None

1988: None

1989: None

1990: \$14,000. Source: The Virginia Hospital Association for my Supreme Court brief and oral argument in Wilder v. Virginia Hospital Association.

1991: \$43,425. Source: Owens-Illinois, Inc. I briefed and argued cases (and provided strategic analysis) opposing the imposition of punitive damages on a corporate defendant in a mass tort case.

1992: \$2400. Source: Georgia-Pacific, Inc. I reviewed a brief opposing punitive damages filed by Covington & Burling on behalf of Georgia-Pacific.

\$2,000. Source: The Smith, Anderson law firm of Raleigh, NC. I reviewed a brief filed by the Smith, Anderson firm on behalf of the North Carolina Board of Medical Examiners.

\$15,900. Source: Ameritech, Inc. I prepared a memorandum for a regional Bell operating company on whether



Congress could preclude such companies from providing information services.

\$141,060. Source: Owens-Illinois, Inc.

I briefed and argued cases (and provided strategic analysis) opposing the imposition of punitive damages on a corporate defendant in a mass tort case.

16. Do any of the entities listed in #15 have matters currently pending before an agency of the United States government? If so, please identify those entities and the agency or agencies before which such matters are pending.

I would expect that each of these corporations probably has some matter or matters pending before one or more agencies of the federal government. Since I am no longer involved with any of these corporations, I am not aware of what those matters might be.

17. At the Justice Department, will you recuse yourself from any issue or matter in which any entity listed in #15 has an interest?

I will consult with the Designated Ethics Officer of my agency in any case in which my participation would constitute a conflict of interest or the appearance of such a conflict and I will recuse myself from any such matter.

August 2, 1993

BY HAND DELIVERY

The Honorable Jesse Helms  
United States Senate  
Washington, DC 20510-6275

Dear Senator Helms,

I received your letter of July 29, 1993 shortly before 5:00pm on Friday, July 30, 1993. In my July 14, 1993 response to your earlier letter of June 30, I answered all of your questions fully to the best of my recollection.

In your letter of June 30, you asked about my participation in the confirmation processes for Chief Justice Rehnquist, Judge Bork and Justice Thomas. I stated with respect to the nomination of Judge Bork that "I briefed the Chairman of the Senate Judiciary Committee on the original understanding of the Advice and Consent Clause and on the nominee's writings. My principal participation was as a witness at the Hearings." I believe this remains a fair statement of my activities. In your letter of July 29, you ask a number of specific questions concerning my discussions with the Chairman. Those discussions fall within the scope of my earlier answer. I did meet with a group informally called "advisors" on three or four occasions; my role was to discuss the nominee's writings, which cover, among other matters, unenumerated rights. In a conference call shortly after Justice Powell's resignation, I discussed the nominee's writings in the context of the cases in which Powell had cast a dispositive vote. To my knowledge, Christopher Schroeder is the only other Duke University staff member, employee or student who assisted the Judiciary Committee. I have no recollection of lending my name to any fund raising advertisement or appeal concerning the nomination of Judge Thomas.

Other questions in your latest letter are based on inaccurate premises. I did not play Judge Bork in practice sessions. I did not draft, review or offer comments on any statement by Senator Kennedy. Although Senator Terry Sanford may have planned to host a briefing for other Senators, no such briefing was ever held to my knowledge. I do not specifically recall having recruited law school deans and professors to sign a letter concerning the nomination, though I may have signed the letter circulating a draft or signed the letter itself. I was not responsible for selecting or scheduling panels of witnesses, though Senator Biden's staff did informally consult me about my opinion of a few proposed witnesses. I did not write any part of the "Biden Report" or "Biden Book;" I did, as I noted, review the report. I never functioned as a press spokesman for anyone. I have no recollection of making any comments about initiatives by Presidents Jackson or Roosevelt.

With respect to other matters that you raise in your latest letter, I would note that many (if not most) of those who testified either in favor of or in opposition to the nomination had also given their advice or opinions either to members of the Committee or to the nominee. That did not and does not seem inappropriate to me. Since the fact that I had advised Senator Biden had been widely reported, it did not occur to me to mention it in my prepared statement to the Committee. My views on the Senate's advice and consent function are fully set out in the published writings I have furnished to the Committee and they have not changed. [See my review in The New Republic, December 16, 1985 and Dellinger & Morris, "Advice and Consent to Supreme Court Nominations" Encyclopedia of the American Constitution, 1991 Supplement]. The \$911 payment I made to the IRS was made on January 24, 1993. There was no correspondence: I simply sent in the payment. The IRS has not made any determination that this payment was due, and it may not have been due. I did not at the time hold any position with the government.

My work in the White House counsel's office on the issue of homosexuals in the military consisted of my consulting with the Justice Department about the possibility of seeking stays of judicial proceedings while the political process agreed to by the President, Senator Nunn and the rest of the Congressional leadership was going forward, and keeping the Senate Armed Services Committee fully informed of the status of those cases. I have not formed an opinion on the question of the circumstances in which military effectiveness, morale or unit cohesion would be adversely affected by homosexuals in the military.

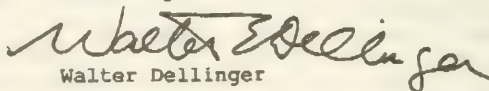
Your letter includes one request for documents that raises difficult issues. You asked me to provide "copies of all memoranda provided by you to members of the Judiciary Committee concerning the nominations of Chief Justice Rehnquist, Justice Thomas and Judge Bork." I responded by submitting one memorandum that had been made public, but noting that I did not understand your question to include confidential legal analysis provided to a Senator that was not intended for public distribution. I have assumed that a legal memorandum written at the request of a Senator and intended by the Senator as private advice should be considered confidential. Any decision to share such a memorandum with others should be made by the Senator at whose request the memorandum was written. As I noted in response to your first letter, my best recollection is that I have advised Senators Mitchell, Biden, Kennedy, DeConcini, Simon, Leahy, and Heflin, and former Senator Sanford. Any request for memoranda should be directed to those Senators.

Senator Helms, as I have noted before, I would be pleased to meet with you at any time. I believe that we have only met once (when North Carolina's 1993 NCAA Championship basketball team was invited to the White House a few months ago). I would be very



happy to sit down and discuss with you any concerns you might have about my nomination. Your office may reach me at 514-2041 or at any time through the Justice Command Center, 514-5000.

Sincerely,

  
Walter Dellinger

cc: Senator Joseph Biden  
Senator Orrin Hatch

## ANSWERS OF ELEANOR ACHESON

TO QUESTIONS POSED BY

SENATOR LARRY PRESSLER

JUNE 22, 1993

Indian Civil Rights

Ms. Acheson, the Office of Policy Development, which you would lead, develops policy on a wide range of issues for the Attorney General.

In my home state of South Dakota, the civil rights of Indians are a primary concern. In Santa Clara Pueblo v. Martinez, (1978), the Supreme Court held that suits against a tribe for violations of the Indian Civil Rights Act may not be brought in federal court. As a result, individual tribal members, although citizens of the United States, are limited to relief, if any, in their respective tribal court systems. Many tribal governments do not provide for a court system independent of the executive, creating the possibility of intimidation of the tribal judiciary by the executive leadership.

Several years ago, I cosponsored a bill with my friend from Utah, Senator Hatch, which would have permitted individuals, who had exhausted their remedies in tribal court for violations of the Indian Civil Rights Act, to bring an action in federal court. This measure did not become law.

- (1) Should Native Americans be entitled to the same constitutional protections afforded to all Americans in our federal courts? If not, why not?

See response to question 2

- (2) Would you support legislation to give Native Americans access to federal court for violations of their civil rights?

I am deeply committed to seeing the nation's civil rights and constitutional laws aggressively enforced. In addition, I want to assure you that I will make every effort to hear and respond to the views and concerns of members of Congress and their constituents regarding civil rights and that I am committed to working with members to address their concerns in this area.

I am not familiar with the specific proposal referred to in your question, or with the complex jurisdictional law in this area. I am aware, however, that jurisdictional issues relating to Native Americans raise very difficult questions.

If confirmed, I will work with Congress to seek appropriate means of vindicating the civil rights of Native Americans while remaining sensitive to tribal sovereignty.

#### Agricultural Cooperatives/Antitrust

As you may know, agricultural cooperatives -- farmers banding together to buy seed, fertilizer, and farm equipment in order to lower the cost -- are exempt from anti-trust enforcement as a result of the Capper-Volstead Act.

- (3) Are you familiar with this exemption, and if so, do you support its continuation? If not, why not?

I am only generally familiar with the Capper-Volstead antitrust exemption, which allows farmers and other persons engaged in the production of agricultural products to act together in associations collectively to process, prepare for market, handle and market their products. As a general matter, in those few instances of exceptions to the antitrust laws, settled expectations weigh against ending the exemption. On this particular matter, I am unaware of any arguments that may have been made against continuing the exemption in its current form, and accordingly have not at this time formed a view on this issue.

#### Joint and Several Liability Reform

Every day executive departments, agencies and employees of the federal government are named as defendants in law suits filed throughout the nation. Often, this is so, not because the government was significantly at fault, but because of the "deep pockets" of the federal government. The Civil Division of the Justice Department is responsible for defending the government in these actions.

- (4) Do you agree that joint and several liability reform would save the government a considerable amount of time, energy and money that is now being spent to defend lawsuits in which the government is, at most, only marginally at fault but where it could end up paying the full amount of the damages involved?

If you do not agree, please explain.

Reforming the "Joint and Several Liability" doctrine is a matter worthy of serious study. Most states that have earlier followed such a doctrine have since reformed their laws to provide more equitable treatment for the involved parties.

I am not presently familiar with the cases in which the United States is a defendant on the joint and several



liability basis you suggest. Therefore, I am not in a position to evaluate whether reform of such laws would result in a significant savings for the government.

- (5) Do you support any other type of legal reform which would significantly affect the Civil Division of the Justice Department?

Our nation's civil justice system is in need of reform. The reforms most often proposed are broad in scope covering issues ranging from "discovery reform" to mandated "alternative dispute resolution." If confirmed, I plan to have my staff inventory and research as many reform proposals as possible and to talk with as many constituencies of the civil justice system as possible in order accurately to identify the need for reform and as many acceptable approaches as possible to build consensus for reform to reduce costs and delays and to improve access. While reform is needed, it is important to bear in mind that the courts were established to serve people. Reform must be accomplished in a manner that respects the principle of maintaining access to the courts.

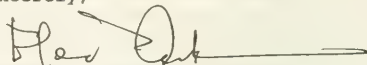
June 29, 1993

The Honorable Larry Pressler  
United States Senate  
Committee on the Judiciary  
Washington, D.C. 20510

Dear Senator Pressler:

Attached are my responses to the written questions that you recently submitted. I hope you will find them satisfactory. If I can provide any further information, please do not hesitate to contact me at (202) 514-2107.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Eleanor D. Acheson', with a long horizontal flourish extending to the right.

Eleanor D. Acheson

QUESTIONS FROM SENATOR LARRY PRESSLER TO ELEANOR D. ACHESON

THE COUNTRY CLUB OF BROOKLINE, MA

IN YOUR RESPONSES TO SENATOR BIDEN'S QUESTIONS OF JUNE 23, 1993, YOU STATE THAT "AFRICAN-AMERICANS HAVE BEEN INVITED TO JOIN (THE COUNTRY CLUB OF BROOKLINE, MA), AND ONE WAS ADMITTED SOME MONTHS AGO", THEN YOU STATE THAT "HE, ALONG WITH OTHER RECENT ADMITTEES, IS WAITING FOR A SLOT TO OPEN."

DAVID CHAG, THE GENERAL MANAGER OF "THE COUNTRY CLUB", TOLD A SENATE JUDICIARY COMMITTEE INVESTIGATOR WITHIN THE LAST THREE WEEKS THAT THERE CURRENTLY ARE NO AFRICAN-AMERICAN MEMBERS OF THE CLUB, THOUGH AT LEAST ONE WAS IN THE PROCESS OF BECOMING A MEMBER.

1. PLEASE CLARIFY WHAT YOU MEANT WHEN YOU STATED THAT ONE AFRICAN-AMERICAN "WAS ADMITTED SOME MONTHS AGO." IT IS NOT A FACT THAT THERE ARE NO AFRICAN-AMERICANS WHO ARE FULLY ADMITTED MEMBERS WITH NO RESTRICTIONS ON THEIR USE OF THE CLUB FACILITIES?

The individual who "was admitted some months ago" successfully completed the process for admission in the fall of 1992. He now awaits an opening, along with others who completed this process before him and after. That process includes being proposed and seconded, having at least eight letters of support from full members of the club, having the candidate's name posted for two months, being recommended by the Admissions Committee to the Board of Governors, and finally being voted upon favorably by the Board. All of this occurred for the African American individual in question this past fall.

2. HOW LONG OF A TIME PERIOD DO YOU EXPECT HE WILL HAVE TO WAIT BEFORE BEING FULLY ADMITTED?

I understand that it is approximately a two-year wait for a slot to open once an individual completes the admissions process.

3. PLEASE DESCRIBE IN DETAIL THE EFFORTS THAT YOU, PERSONALLY, TOOK TO OBTAIN THE ADMITTANCE OF THIS AFRICAN AMERICAN.

I do not know the individual in question, nor was I aware of the invitation to him to join the club. The club sends out notices identifying proposed members and their respective proposers, but neither identifies proposed members by race nor posts or otherwise disseminates photographs of any proposed member.

4. ARE YOU AWARE OF THE ROLE OF ANY PERSON IN THE CURRENT ADMINISTRATION, OR ANY PERSON INVOLVED IN POLITICAL ACTIVITY, WHO WAS INVOLVED IN ANY WAY IN GAINING THIS AFRICAN AMERICAN ADMITTANCE TO THE COUNTRY CLUB? IF SO, STATE WHO DID SO, THE EXTENT OF THEIR EFFORTS, THEIR POSITION, ADDRESS AND PHONE



NUMBER.

I am not aware that any person in the current Administration or involved in political activity was involved in gaining admission for this individual.

5. HAVE YOU EVER SPONSORED, OR ENCOURAGED, AN AFRICAN AMERICAN TO BE A MEMBER AT THE COUNTRY CLUB? IF SO, LIST THE NAME OF EACH INDIVIDUAL WHOM YOU SPONSORED OR ENCOURAGED, AS WELL AS THEIR ADDRESS AND PHONE NUMBER. DESCRIBE COMPLETELY YOUR EFFORTS AND THE RESULTS.

As an Associate member of the club, I was unable to sponsor individuals for membership in the club. I brought an African American friend to the club to play tennis, but I do not recall whether we discussed membership in the club.

6. HAVE YOU EVER SPONSORED, OR ENCOURAGED, ANY WOMAN TO BE A MEMBER AT THE COUNTRY CLUB? IF SO, LIST THE NAME OF EACH INDIVIDUAL WHOM YOU SPONSORED OR ENCOURAGED, AS WELL AS THEIR ADDRESS AND PHONE NUMBER. DESCRIBE COMPLETELY YOUR EFFORTS AND THE RESULTS.

As an Associate member of the club, I was unable to sponsor individuals for membership in the club. I brought women to the club but I do not recall whether we discussed membership in the club.

7. YOU STATED IN YOUR CONVERSATION WITH A COMMITTEE INVESTIGATOR THAT YOU JOINED THE COUNTRY CLUB IN 1985, APPROXIMATELY, AS AN "ASSOCIATE MEMBER", WHICH AT THE TIME WAS THE ONLY STATUS WOMEN COULD ATTAIN. WHEN DID THE CLUB FIRST ALLOW WOMEN AS "ASSOCIATE MEMBERS"? PRIOR TO THAT TIME, COULD WOMEN BECOME MEMBERS ONLY AS A RESULT OF THEIR HUSBAND'S MEMBERSHIP?

For some time preceding the mid-1970's, the club had a category of membership called "associate member" to accommodate widows of deceased members, and then later divorcees and adult daughters of members. I believe, but do not know for sure, that it was in the 1970's that associate membership was expanded to include women with no family ties to the club.

8. WHY DID YOU INITIALLY SEEK MEMBERSHIP AT A COUNTRY CLUB WHICH YOU KNEW DISCRIMINATED IN THEIR TREATMENT OF WOMEN? DESCRIBE IN DETAIL THE CIRCUMSTANCES UNDER WHICH YOU JOINED THE COUNTRY CLUB? WHO SPONSORED YOU, LIST THEIR ADDRESSES AND PHONE NUMBERS?

I was first asked to consider joining the club in 1983 or 1984. At that time, I had been a guest at the club on a number of occasions, including a guest of friends who were associate members. The differences between a full membership and an associate membership were, as far as I understood, that associate

members could not vote at the annual meeting and could not propose or sponsor candidates for membership at the club. I did not believe that friends who were associate members felt like second class citizens, and my friends who were full members did not treat associate members like second-class citizens.

I joined the club at the urging of a close friend who was then Treasurer of the club and who, along with others, was attempting to expand the membership of the club to include people regarded as younger professionals active in the greater Boston community. One of my proposers was Robert Osteen, M.D. whom I knew fairly well because his wife is a partner of mine at Ropes & Gray. I cannot recall for certain the other individual who sponsored me, although I believe Shaw McDermott, a friend and the managing partner of the Boston office of Kirkpatrick & Lockhart, may also have proposed me and at least wrote a letter in support of my membership. At the time I joined the club, I understood that there were full members and wives of full members who were militating for full membership status for women.

9. IN 1989, YOU STATED THAT THE RULES AT THE COUNTRY CLUB WERE CHANGED TO ALLOW WOMEN TO BECOME "FULL MEMBERS". WHAT BROUGHT ABOUT THIS CHANGE? DESCRIBE COMPLETELY YOUR EFFORTS TO BRING ABOUT THIS CHANGE.

As stated above, since approximately the mid-1980's some full members and wives of full members were working to effect this change. Although I was not active in this effort, I urged the Treasurer of the club to do what he could in his leadership capacity to change this rule.

10. WHEN YOU JOINED THE CLUB IN 1985, WERE AFRICAN AMERICANS ALLOWED BY THE RULES TO BECOME "FULL MEMBERS" OR ONLY "ASSOCIATE MEMBERS"? EXPLAIN.

I am not aware that at any time African Americans were limited in their ability to become full members of the club. Had I ever heard of any rule, practice or incident suggesting any discrimination against African Americans by the club or had any other reason to believe the club had engaged or ever would engage in discrimination against an African American applicant for membership or as a guest, I would not have joined the club. Before I joined as an associate member, as a guest I saw African Americans at the club and understood that the club had members of color. In addition, I invited an African American friend to play tennis at the club after becoming an associate member. Further, Africans Americans have been invited to join the club (see letter of Deval Patrick, Esq., now a partner of Hill & Barlow, and formerly a civil rights litigator with the NAACP).

THE LONGWOOD CRICKET CLUB OF CHESTNUT HILL, MA, AND  
THE BADMINTON AND TENNIS CLUB OF BOSTON, MA

IN YOUR RESPONSE TO THE SENATE JUDICIARY COMMITTEE QUESTIONNAIRE THAT IS REQUIRED OF ALL NOMINEES WHO COME BEFORE THE COMMITTEE,

YOU INDICATE YOUR CURRENT MEMBERSHIP IN THE LONGWOOD CRICKET CLUB OF CHESTNUT HILL, MA, AND THE BADMINTON AND TENNIS CLUB OF BOSTON, MA. IN YOUR RESPONSE TO SENATOR BIDEN'S QUESTIONS, YOU STATE THE REASON FOR YOUR RESIGNATION FROM THE COUNTRY CLUB OF BROOKLINE, MA, WAS YOUR ANTICIPATED MOVE TO WASHINGTON, DC.

11. WHY DID YOU RESIGN FROM THE COUNTRY CLUB BUT NOT THE LONGWOOD CLUB OR THE BADMINTON AND TENNIS CLUB? PLEASE BE EXPANSIVE IN YOUR ANSWER.

I resigned from The Country Club because I had used that facility infrequently since 1987 and because the cost of maintaining a nonresident or inactive membership was relatively high, particularly as I doubted I would ever use the facility. I am primarily, if not exclusively, a fairly good and competitive tennis player. As I have a bad left leg from polio and various therapeutic surgeries, I can really only play on clay, Hartru or grass courts. Most clubs in the Boston area have some variety of "hard" surfaces, with the exception of Longwood, the Badminton and Tennis Club, The Country Club and a few others. I joined Longwood in 1978 in order to have a place to play tennis in the summer. I joined the Badminton and Tennis Club sometime in the early 1980's in order to play tennis in the winter. I chose to join The Country Club not only because it also had very competitive tennis and Hartru tennis courts, but also because I thought it would be fun to learn how to play golf. Although I did play golf there a few times a summer in the early years of my membership, increasingly I did not have the time it takes to play golf and to practice. For example, in 1988 I did not play golf more than twice. In 1989 and 1990, I may have played once a summer. In 1991 and 1992, I did not play golf once and played tennis only a few times in 1991 and not once in 1992. In sum, it did not seem "worth it" to retain any kind of membership at The Country Club. I have retained inactive membership or non-resident status in the Longwood Cricket Club and in the Badminton and Tennis Club because these are memberships which I have fully utilized and I can retain my place at minimal cost.

12. WHEN DID YOU JOIN THE LONGWOOD CRICKET CLUB? WHEN DID YOU JOIN THE BADMINTON AND TENNIS CLUB?

I joined the Longwood Cricket Club in 1978. I joined the Badminton and Tennis club sometime in the early 1980's.

13. DESCRIBE IN DETAIL THE RACIAL AND SEXUAL MAKEUP OF THE MEMBERSHIP AT THE LONGWOOD CLUB AND THE BADMINTON AND TENNIS CLUB AT THE TIME YOU JOINED EACH OF THESE CLUBS--PLEASE PROVIDE THE FOLLOWING:

--HOW MANY MEMBERS BELONGED AT EACH CLUB?

I do not know how many members there were in each club when I joined. Currently, there are roughly 800 members of the Longwood Cricket Club. Currently, there are approximately 480



members of Badminton and Tennis Club.

--HOW MANY MEMBERS OF EACH CLUB WERE AFRICAN AMERICANS?

I do not know the number of African Americans who were members when I first joined the Longwood Cricket Club. An African American (and friend) named Josephus Long was an active member until his death about two years ago. David Bianco, Manager of Longwood, has informed me that in the nine years since he has been at the club, there have been four African American members of the club. The former President of the Longwood Cricket Club (a woman) established a diversity committee which worked to build a more diverse membership. I served on that diversity committee.

I do not know the number of African Americans who were members of the Badminton and Tennis Club at the time I joined. Joe Long was also a member of the Badminton and Tennis Club until his death. According to the pro and manager of the Badminton and Tennis Club, in the 17 to 19 years he has been with the club, only two individuals have been refused membership -- both were white, and the refusals were many years ago.

--HOW MANY MEMBERS OF EACH CLUB WERE FEMALE?

Numerous members of Longwood and the Badminton and Tennis Club are women. The immediate past President of Longwood is a woman.

14. DESCRIBE IN DETAIL THE CURRENT RACIAL AND SEXUAL MAKEUP OF THE MEMBERSHIP AT THE LONGWOOD CLUB AND AT THE BADMINTON AND TENNIS CLUB--PLEASE PROVIDE THE FOLLOWING:

--HOW MANY MEMBERS BELONG AT EACH CLUB?

There are approximately 480 members of the Badminton and Tennis Club. I do not know the current racial make-up of the club as the management has never listed its membership by race. However, there has been at least one African American member and other members of color.

There are roughly 800 members of the Longwood Cricket Club. I do not know the current racial make-up of the club. Members are not identified by race. There have been African American members and other members of color. The manager of Longwood has estimated ten Hispanic members, 10 Indian members, and estimated that the club is 30% Jewish.

--HOW MANY MEMBERS OF EACH CLUB ARE AFRICAN AMERICANS?

A friend of mine and someone with whom I occasionally played tennis, an African American man, was a member of both the Badminton and Tennis Club and the Longwood Cricket Club. Unfortunately he died two years ago. His son remains a member of the Longwood Cricket Club. According to the pro for the

Badminton and Tennis Club, he is not aware of any African Americans who are currently members but no African American has ever been denied membership.

--HOW MANY MEMBERS OF EACH CLUB ARE FEMALE?

I do not know the numbers of women who are members of the clubs on their own, as opposed to being part of a family membership. All I can say is that there are numerous women members and the immediate past president of Longwood is a woman. That woman and other women at Longwood are also members of the Badminton and Tennis Club.

15. DESCRIBE IN DETAIL THE DIFFERENT TYPES OF MEMBERSHIPS AT EACH CLUB, SUCH AS "FULL", "ASSOCIATE", OR "EXECUTIVE" MEMBERSHIPS?

I am unfamiliar with these terms in the context of Longwood or the Badminton and Tennis Club. I believe the different membership categories are family, single, junior, non-resident and/or inactive.

16. ARE WOMEN NOW, OR WERE THEY AT THE TIME YOU JOINED, PROHIBITED FROM BECOMING "FULL" MEMBERS AT EITHER OF THE CLUBS? IF SO, EXPLAIN FULLY.

No.

17. ARE AFRICAN AMERICANS NOW, OR WERE THEY AT THE TIME YOU JOINED, PROHIBITED FROM BECOMING "FULL" MEMBERS AT EITHER OF THE CLUBS? IF SO, EXPLAIN FULLY

No.

#### ENTRANCE FEES AND ANNUAL DUES

18. WHAT WERE THE AMOUNTS OF THE ENTRANCE FEE AND ANNUAL DUES CHARGED BY THE COUNTRY CLUB OF BROOKLINE, MA, WHEN YOU JOINED? WERE THESE FEES PAID BY YOU, PERSONALLY, OR ON YOUR BEHALF BY YOUR LAW FIRM, ROPES AND GRAY? PLEASE PROVIDE COPIES OF CASHED CHECKS OR RECEIPTS EVIDENCING PAYMENT FOR EACH YEAR OF YOUR MEMBERSHIP AT EACH CLUB.

I do not recall the amounts of these fees and dues. The dues for an associate membership at the time I resigned were \$2200 a year. I paid the club fees personally and do not believe that I retained any checks or receipts. Ropes & Gray never paid these fees.

19. WHAT WERE THE AMOUNTS OF THE ENTRANCE FEE AND ANNUAL DUES CHARGED BY THE LONGWOOD CRICKET CLUB IN CHESTNUT HILL, MA, WHEN YOU JOINED? WERE THESE FEES PAID BY YOU, PERSONALLY, OR ON YOUR BEHALF BY YOUR LAW FIRM, ROPES AND GRAY? PLEASE PROVIDE COPIES OF CASHED CHECKS OR RECEIPTS EVIDENCING PAYMENT FOR EACH YEAR OF YOUR MEMBERSHIP AT EACH CLUB.

I do not recall the amounts of these fees and dues. The dues for an individual at the time I resigned last year were about \$1100 a year. I paid the club fees personally and doubt I retained any checks or receipts. Ropes & Gray never paid these fees.

20. WHAT WERE THE AMOUNTS OF THE ENTRANCE FEE AND ANNUAL DUES CHARGED BY THE BADMINTON AND TENNIS CLUB OF BOSTON, MA WHEN YOU JOINED? WERE THESE FEES PAID BY YOU PERSONALLY, OR ON YOUR BEHALF BY YOUR LAW FIRM, ROPES AND GRAY? PLEASE PROVIDE COPIES OF CASHED CHECKS OR RECEIPTS EVIDENCING PAYMENTS FOR EACH YEAR OF YOUR MEMBERSHIP AT EACH CLUB.

I do not recall the amounts of these fees and dues. The current initiation fee is \$700 for an individual and \$1100 for a family. The current annual dues are about \$500 for an individual and \$850 for a family. I paid the club fees personally and doubt I retained any checks or receipts. Ropes & Gray never paid these fees.

21. HAS A CLIENT OF YOUR EVER PAID THE FULL AMOUNT, OR ANY PORTION OF, YOUR ENTRANCE FEES OR ANNUAL DUES AT ANY OF THE COUNTRY CLUBS TO WHICH YOU HAVE BELONGED? IF SO, LIST THE AMOUNT PAID, THE NAME OF THE CLIENT, THEIR ADDRESS AND PHONE NUMBER. EXPLAIN FULLY THE CIRCUMSTANCES UNDER WHICH THIS WAS DONE.

No.

22. HAVE YOU EVER DEDUCTED AS A BUSINESS EXPENSE FROM A FEDERAL, STATE, OR LOCAL TAX RETURN THE FULL AMOUNT, OR ANY PORTION, OF THE ENTRANCE FEES OR THE ANNUAL DUES OF ANY OF THE COUNTRY CLUBS TO WHICH YOU HAVE BELONGED? IF SO, PROVIDE A COPY OF THE RETURN SHOWING THIS DEDUCTION. DESCRIBE FULLY THE CIRCUMSTANCES UNDER WHICH THIS WAS DONE.

No.

23. WHEN YOU RESIGNED FROM THE COUNTRY CLUB, WAS YOUR ENTRANCE FEE REFUNDED? PLEASE FURNISH A COPY OF YOUR RESIGNATION LETTER TO THE COUNTRY CLUB. WHAT ARE YOUR RIGHTS TO REJOIN THE COUNTRY CLUB PRESENTLY? IF YOU CHOSE TO REJOIN, WOULD YOU BE REQUIRED TO PAY THE ENTRANCE FEE ANEW? IF YES, WHAT WOULD BE THE AMOUNTS OF THE ENTRANCE FEE AND ANNUAL DUES?

My entrance fee was not refunded. I do not have a copy of my letter of resignation with me. As I understand it, the current rules are that if I move back to the Boston area and want to do so, I may apply to the club for membership like any new member and if admitted I would pay another initiation fee and, of course, the then current dues. When I resigned I suggested the club reconsider that policy particularly in the case of people going into public service. An officer of the club responded that my suggestion is being considered by the Board. As club fees are periodically adjusted upward, I cannot say what initiation fees



and club dues will be in the future.

24. PLEASE GIVE A THOROUGH SEQUENCE OF DATES AND EVENTS LEADING TO YOUR NOMINATION. INCLUDE THE FOLLOWING:

--THE DATE WHEN YOU RESIGNED FROM THE COUNTRY CLUB.

I believe my letter of resignation was dated in late March of 1993.

--THE DATE WHEN YOU WERE FIRST CONTACTED BY THE PRESENT ADMINISTRATION REGARDING A POSSIBLE POSITION IN THE ADMINISTRATION.

As of the inauguration, Administration officials had asked me to consider a position in the Department of Justice. I was interested but was, at that time, also very interested in the position of U.S. Attorney for Massachusetts, a position for which I applied on March 1, 1993. On March 15, 1993, the Monday following Attorney General Reno's confirmation and swearing-in, I was informed that the President and Attorney General wanted me to serve as Assistant Attorney General for Policy Development. I responded that I would decide whether to accept or to stay in the field for the U.S. Attorney position by the end of the day. I did that, decided to go forward with the Assistant Attorney General position and withdrew from the U.S. Attorney field on Tuesday, March 16, 1993. Over the next few days, I informed Ropes & Gray of my decision and notified other organizations, including the clubs in question of my decisions with respect to leaving the Boston area and my status at these clubs.

--THE DATE WHEN YOU WERE FIRST NOTIFIED OF YOUR NOMINATION TO BE ASSISTANT ATTORNEY GENERAL FOR THE OFFICE OF POLICY DEVELOPMENT

I was notified the week of April 29 that an announcement would be made that week nominating me for the position of Assistant Attorney General for the Office of Policy Development.

#### ROPES AND GRAY

25. WAS JOINING ANY OF THE THREE CLUBS MENTIONED ABOVE A FORMAL OR INFORMAL REQUIREMENT OF BEING A PARTNER AT ROPES AND GRAY? IF SO, EXPLAIN IN DETAIL.

No.

26. IF THE FEES OR DUES REFERENCED IN QUESTION 19, 20, OR 21 WERE PAID BY ROPES AND GRAY, DID THE FIRM OFFER TO PAY THE FEES OR DUES OF ANY AFRICAN AMERICAN PARTNERS TO JOIN ANY ONE OF THESE THREE CLUBS? IF NOT, EXPLAIN IN DETAIL WHY THIS WAS NOT DONE?

Not applicable.

RESOLUTION OF THE U.S. SENATE COMMITTEE ON THE JUDICIARY

A RESOLUTION PASSED BY THE JUDICIARY COMMITTEE IN AUGUST 1990 STATES THAT IT IS THE SENSE OF THE COMMITTEE THAT CLUBS WHICH DISCRIMINATE ON THE BASIS OF RACE, RELIGION, SEX OR NATIONAL ORIGIN OPERATE TO EXCLUDE WOMEN AND MINORITIES FROM BUSINESS AND PROFESSIONAL OPPORTUNITIES.

SECTION (2) OF THE RESOLUTION STATES THAT:

"MEMBERSHIP IN SUCH DISCRIMINATORY CLUBS MAY BE VIEWED AS A TACIT ENDORSEMENT OF SUCH DISCRIMINATORY PRACTICES;"

SECTION (3) OF THE RESOLUTION STATES THAT:

"MEMBERSHIP IN SUCH DISCRIMINATORY CLUBS CONFLICTS WITH THE IMPARTIALITY, AND THE APPEARANCE OF IMPARTIALITY, REQUIRED OF INDIVIDUALS WHO MAY SERVE IN POSITIONS IN THE FEDERAL JUDICIARY OR THE DEPARTMENT OF JUSTICE".

THE OFFICE OF POLICY DEVELOPMENT PLAYS A SIGNIFICANT ROLE IN THE SELECTION PROCESS OF FEDERAL JUDICIAL CANDIDATES. IF CONFIRMED TO HEAD THE OFFICE, PART OF YOUR DUTIES WILL BE TO EVALUATE SUCH CANDIDATES AS TO THEIR QUALIFICATIONS AND COMPLIANCE WITH THE POLICIES OF THE ADMINISTRATION AND THE SENATE JUDICIARY COMMITTEE.

27. IF CONFIRMED FOR THIS POSITION, WOULD YOU VIEW A CANDIDATE FOR A POSITION IN THE FEDERAL JUDICIARY AS TACITLY ENDORSING A DISCRIMINATORY PRACTICE IF THE CANDIDATE HAD BEEN A MEMBER OF A COUNTRY CLUB, LOCATED IN A MAJOR METROPOLITAN AREA, WHICH PRESENTLY HAS NO AFRICAN AMERICAN MEMBERS OF EITHER FULL STATUS OR ASSOCIATE STATUS, IF THE CANDIDATE HAD TAKEN NO BONA FIDE ACTION TO ADMIT MEMBERS OF THE AFRICAN AMERICAN RACE TO THE CLUB? EXPLAIN FULLY.

If confirmed for the position of Assistant Attorney General for the Office of Policy Development, my approach would be similar to the philosophy embodied by the Senate Judiciary Committee's 1990 resolution. I would carefully evaluate whether such a candidate for a federal judicial position was a member of a discriminatory club. I would not view a club as discriminatory simply because it does not "currently" have African American members, and I do not understand the Senate Judiciary Committee resolution to say otherwise. I would look at whether the club has ever by rule or by practice discriminated against African Americans, whether the club has other members of color, whether African Americans have ever been refused membership in the club, whether African Americans have ever been members, whether African Americans have been asked to become members, whether the club has made any pro-active effort to attract African American members, and whether African Americans have been welcomed guests. I would also look at the club's admission policies to see if there were active statements of non-discrimination.

If the club had any kind of policy or practice prohibiting or discouraging African American members or guests, or had turned

down African Americans for membership. I would question whether such a candidate for the federal judiciary was aware of this discriminatory practice and whether the individual had made any attempts to seek out African Americans for membership. If he or she had not done so, I would look at the rest of his/her record in connection with civil rights for African Americans or other minorities before forming a final judgment, consistent with the Senate Judiciary Committee's resolution.

28. IF CONFIRMED FOR THIS POSITION, WOULD YOU VIEW A CANDIDATE FOR A POSITION IN THE FEDERAL JUDICIARY AS TACITLY ENDORSING A DISCRIMINATORY PRACTICE IF THE CANDIDATE HAD BEEN A MEMBER OF A COUNTRY CLUB, LOCATED IN A MAJOR METROPOLITAN AREA, WHICH UNTIL RECENTLY HAD DISCRIMINATED AGAINST WOMEN AS A MATTER OF POLICY IN CLEAR VIOLATION OF THE PRESENT STANDARD DESCRIBED IN THE JUDICIARY COMMITTEE RESOLUTION IF THE CANDIDATE HAD TAKEN NO BONA FIDE ACTION TO ADMIT MEMBERS OF THE FEMALE SEX TO THE CLUB? EXPLAIN COMPLETELY.

If confirmed for this position, I would not view a candidate for a federal judicial position as tacitly endorsing a discriminatory practice, if at the time of the adoption of the Senate Judiciary Committee resolution, the country club in question had abandoned its policy of assigning women to a separate membership status, and was accepting women to full membership on the same basis as men.

29. IF CONFIRMED FOR THIS POSITION, WHAT WILL BE THE DEFINITION OF "INVIDIOUS DISCRIMINATION": WHICH YOU WILL USE WHEN EVALUATING A CANDIDATE FOR A POSITION IN THE FEDERAL JUDICIARY? PLEASE EXPLAIN YOUR POSITION ON THIS ISSUE THOROUGHLY.

If confirmed by the Senate, I would look to the Senate Judiciary Committee resolution for the definition of "invidious discrimination" in this context. As I understand the resolution, "invidious discrimination" is the intent to prevent or discourage by policy or practice, a member of a protected class from membership in a club where business is conducted. It is membership in clubs of that type that may be viewed as a tacit endorsement of the discriminatory practices that constitute the bar. I would so view it and would then look at other factors, particularly those bearing on the candidate's activities and efforts in support of civil rights and in promoting equality in his or her community at large, before forming a final judgment.

30. DO YOU PRESENTLY BELONG TO ANY OTHER CLUBS OR OTHER ORGANIZATIONS WHICH DO NOW, OR HAVE IN THE PAST, DISCRIMINATED BY THE RULE OR IN FACT AGAINST AFRICAN AMERICANS OR ANY OTHER MINORITY GROUP OR WOMEN? HAVE YOU IN THE PAST EVER BELONGED TO SUCH AN ORGANIZATION? IF SO, PLEASE EXPLAIN COMPLETELY.

No. I have never belonged to any club or organization which discriminates against African Americans or any other minority group. As stated in the Senate Judiciary Committee



questionnaire, I was an Associate member of the Country Club of Brookline which, prior to 1989, limited membership for women to associate status.

July 13, 1993

The Honorable Larry Pressler  
United States Senate  
Committee on the Judiciary  
Washington, DC 20510

Dear Senator Pressler:

Attached are my answers to the most recent questions you submitted. I have also sent a copy of my letter of resignation from The Country Club, as you requested. I trust that these answers will satisfy your concerns.

Sincerely,

  
Eleanor D. Acheson

## ADDITIONAL QUESTIONS TO ELEANOR ACHESON FROM SENATOR PRESSLER

1. IN YOUR RESPONSE TO QUESTION 10 IN SENATOR PRESSLER'S FIRST SET OF QUESTIONS, ASKING WHETHER, IN 1985 WHEN YOU JOINED TCC, AFRICAN AMERICANS COULD BECOME FULL MEMBERS, YOU STATED THAT YOU WOULD NOT HAVE JOINED THE CLUB IF YOU HAD "EVER HEARD OF ANY RULE, PRACTICE OR INCIDENT SUGGESTING ANY DISCRIMINATION AGAINST AFRICAN AMERICANS BY THE CLUB OR HAD ANY REASON TO BELIEVE THE CLUB WAS ENGAGED OR EVER WOULD ENGAGE IN DISCRIMINATION AGAINST AN AFRICAN AMERICAN APPLICANT."

ON AUGUST 2, 1990, THE SAME DATE THE JUDICIARY COMMITTEE ADOPTED ITS RESOLUTION CONDEMNING NOMINEES WHO BELONG TO DISCRIMINATORY COUNTRY CLUBS, THE ATTACHED ARTICLE, "NO BLACKS ARE MEMBERS OF THE COUNTRY CLUB" RAN IN THE BOSTON GLOBE. IN THE LATE '80S AND EARLY '90S, THERE WAS MUCH DISCUSSION IN THE NEWS MEDIA REGARDING DISCRIMINATION AT TCC. ADDITIONALLY, CONVERSATIONS WITH A NUMBER OF BOSTON RESIDENTS REVEAL THAT TCC IS WELL KNOWN IN THE COMMUNITY FOR HAVING DISCRIMINATORY PRACTICES. THERE WERE MEDIA REPORTS OF A CITY COUNCILMAN TRYING TO REMOVE TCC'S LIQUOR LICENSE BECAUSE OF DISCRIMINATION.

WERE YOU TOTALLY UNAWARE OF THE COMMUNITY'S PERCEPTION OF DISCRIMINATION AT TCC? IF NOT, WHY DIDN'T YOU EITHER MAKE EFFORTS TO REMEDY THE SITUATION OR RESIGN IN ACCORDANCE WITH THE AUGUST 2, 1990, RESOLUTION PASSED BY THE JUDICIARY COMMITTEE?

As I have previously stated, I would not have joined the club had I heard of any policy, practice or incident suggesting discrimination against African Americans by the club, and I do not believe that the club has any such policies or practices. I was not aware of the Boston Globe article of August 2, 1990, to which you refer, which I understand appeared in the sports section of the paper. I do not believe that "there was much discussion in the news media regarding discrimination at TCC." Indeed, the included Globe article does not state that The Country Club had discriminatory policy or practices; it states only that it had no African American members, and noted that the club had affirmatively attempted to recruit African American members "... within the last two years ...". With respect to women, I knew that the club had a different member status for women, and I understood when I joined that members and wives of members were pressing the Board of Governors to permit women to join as full members. I made my views on the different membership status for women known to an officer of the club.

I was not aware that a city councilman--presumably a town selectman, as Brookline is a separate town and not part of either city, Boston or Newton,--was trying to remove the club's liquor license because of discrimination. I have now seen the letter solicited from Ms. Myrna Kahn of the Brookline Commission on the Status of Women regarding the



club's liquor license. Respectfully, Ms. Kahn's position appears to be based on an erroneous premise; she seems to conclude that the club's unwillingness to identify its women members means that it does not have any. In March of 1991, there were many women who were full members of this club.

I was and remain unaware of any perception that the club discriminated on racial, ethnic or religious grounds. I believe that those associated with the club, and some not associated with the club, knew of the club's different and more limited membership for women, and know that that policy and practice, respectively, ended before the Senate Judiciary Committee resolution on private club memberships.

I did not believe, and do not believe, that the club discriminated on the basis of race, and I did not resign from the club for that reason. The different membership for women was eliminated in 1989, before the Senate Judiciary Committee resolution.

2. WHEN THE RESOLUTION MENTIONED ABOVE WAS DISCUSSED IN AN EXECUTIVE MEETING OF THE JUDICIARY COMMITTEE, SENATOR KENNEDY COMMENTED ON THE ISSUE OF MEMBERSHIP IN A DISCRIMINATORY CLUB BUT EMPHASIZING THAT "THE RESOLUTION PLACES POTENTIAL NOMINEES ON NOTICE THAT THE COMMITTEE CONSIDERS SUCH MEMBERSHIPS INAPPROPRIATE."

HOW DO YOU SQUARE YOUR MEMBERSHIP IN TCC WITH SENATOR KENNEDY'S STATEMENT?

Because the club in question did not and does not discriminate by policy or practice on the basis of race, I was at no time a member of a club that so discriminated. I was an associate member of the club from 1985 to 1993, and until 1989 had no choice about the status of my membership. For the last four years, from a year before the adoption of the Committee resolution, the club has had no policy or practice of discrimination on any basis.

3. THE AUGUST 2, 1990, JUDICIARY COMMITTEE RESOLUTION APPLIES TO "CLUBS WHERE BUSINESS IS CONDUCTED THAT BY POLICY OR PRACTICE INTENTIONALLY DISCRIMINATE ON THE BASIS OF RACE, COLOR, RELIGION, SEX, DISABILITY OR NATIONAL ORIGIN." THE RESOLUTION DOES NOT CLEARLY DEFINE THE MEANING OF "INTENTIONAL DISCRIMINATION." THEREFORE, WE MUST DISCERN THE COMMITTEE'S MEANING FROM THE STANDARD APPLIED IN SUBSEQUENT CASES WHERE NOMINEES BELONGED TO COUNTRY CLUBS ALLEGED TO HAVE DISCRIMINATORY ADMISSIONS PRACTICES.

IN 1991, THE SENATE REJECTED THE CONFIRMATION OF JUDGE KENNETH RYSKAMP, A SITTING FEDERAL JUDGE FROM MIAMI WHO WAS NOMINATED BY PRESIDENT BUSH TO THE 11TH FEDERAL CIRCUIT COURT OF APPEALS. AT THE TIME OF HIS CONFIRMATION HEARINGS, JUDGE RYSKAMP HAD

RECENTLY RESIGNED FROM THE RIVIERA COUNTRY CLUB OF CORAL GABLES, FL, DUE TO ALLEGATIONS OF DISCRIMINATION. JUDGE RYSKAMP DENIED THE ALLEGATIONS, BUT WAS REJECTED BY THE JUDICIARY COMMITTEE ON A STRAIGHT PARTY VOTE.

IN REJECTING JUDGE RYSKAMP, CHAIRMAN BIDEN OUTLINED THE STANDARD THE COMMITTEE USED IN ANALYZING THE ISSUE OF MEMBERSHIP IN AN ALLEGEDLY DISCRIMINATORY CLUB. BIDEN STATES, "(O)UR INVESTIGATION OF THE CLUB SUGGESTS THAT IT HAD A LONGSTANDING PRACTICE OF DISCRIMINATION AGAINST BLACKS AND JEWS, OR AT THE VERY LEAST THERE WAS A WIDESPREAD PERCEPTION OF SUCH DISCRIMINATION..."

A) HOW DO YOU DISTINGUISH BETWEEN THE PERCEPTION OF DISCRIMINATION AT THE RIVIERA COUNTRY CLUB AND THE PERCEPTION OF DISCRIMINATION AT TCC?

I am unaware of the facts concerning the obstacles to Judge Ryskamp's nomination, including the policies and practices of the Riviera Country Club to which he belonged. Thus, I cannot make the comparison you request and can only restate that I do not share your view of the club. It may be worth noting that two appointees of the Bush Administration—Robert S. Mueller III (Assistant Attorney General for the Criminal Division) and Michael Deland (Administrator of the EPA)—one of whom, Mr. Mueller, came before the Judiciary Committee in 1990, were both full members of this club. Both were well regarded public servants about whom or about whose club there was no question of discrimination.

B) DO YOU AGREE THAT THE NEWS ARTICLES AND STORIES IN THE 1980'S AND '90S LEFT THE PERCEPTION OF DISCRIMINATION AT TCC?

No. In fact, since you brought the Boston Globe articles to my attention, I reviewed a 1991 Boston Globe article stating that, "the Brookline club is more progressive than ninety percent of the private clubs in Massachusetts, and has made great strides to give women equal rights."

4. SHOULD YOU BE CONFIRMED FOR THIS POST, YOU WILL BE IN CHARGE OF EXAMINING AND EVALUATING THE BACKGROUNDS AND QUALIFICATIONS OF NOMINEES FOR THE FEDERAL BENCH. SOME OF THESE CANDIDATES MAY BE MEMBERS, OR RECENT FORMER MEMBERS, OF PRIVATE CLUBS WITH AN ACTUAL OR PUBLICLY PERCEIVED PATTERN OF DISCRIMINATORY MEMBERSHIP ADMISSION PRACTICES.

A) HOW WOULD YOU EXPLAIN TO SUCH NOMINEES YOUR OWN PAST MEMBERSHIP IN A PRIVATE CLUB WITH A WIDELY PUBLICIZED LACK OF AFRICAN-AMERICAN MEMBERS AND PUBLICLY PERCEIVED REPUTATION

## FOR DISCRIMINATORY ADMISSION PRACTICES?

If confirmed, I will work as hard, responsibly and appropriately as possible on the important task of evaluating candidates for the federal judiciary. I do not believe it necessary or appropriate to explain to any such candidate my own background, or past or current associations, other than my duties and responsibilities at the U.S. Department of Justice.

B) IF CONFIRMED, WHICH STANDARD WILL YOU USE WHEN SCREENING CANDIDATES FOR POSITIONS IN THE FEDERAL JUDICIARY AND THE JUSTICE DEPARTMENT--THE KENNEDY STANDARD IN WHICH THE COMMITTEE RESOLUTION ONLY APPLIES TO CLUBS THAT "HAVE A POLICY OR PRACTICE OF INTENTIONAL DISCRIMINATION" OR THE BIDEN STANDARD WHERE THE MERE PERCEPTION OF DISCRIMINATION IS SUFFICIENT TO INVOKE THE RESOLUTION?

If confirmed, I will apply the Judiciary Committee's resolution with respect to private club memberships. As I understand it, the exercise of evaluating a judicial candidate to determine if the Attorney General should recommend the candidate to the President for nomination involves looking at the entire record of the individual for the abilities, qualities of character, and experience President Clinton has called for in his nominees. Among those abilities and qualities are a commitment to and a sensitivity to the interests and concerns of all who come before the court, no matter their race, gender, ethnicity, religion or abled or disabled status. The Judiciary Committee has made clear that it too is interested in seeing those qualities, and that it is particularly concerned about what membership in a private club that intentionally discriminates says about a nominee for the Justice Department, or for the federal judiciary in that regard. Thus, as the resolution guides, the policies and practices of any private club will be examined.

5. IN ANSWER TO THE FIRST SET OF QUESTIONS FROM SENATOR PRESSLER, YOU REFERENCED THE SUCCESSFUL COMPLETION OF THE ADMISSION PROCESS OF AN AFRICAN-AMERICAN CANDIDATE FOR MEMBERSHIP AS AN EXAMPLE OF THE COUNTRY CLUB'S (TCC'S) NON-DISCRIMINATORY ADMISSION POLICIES. WHEN ASKED BY A SENATE STAFF MEMBER, THIS CANDIDATE SAID THAT HE HAD NEVER BEEN OFFICIALLY NOTIFIED THAT HE WAS ON A WAITING LIST FOR ENTRANCE INTO TCC.

A) WAS THIS CANDIDATE EVER OFFICIALLY NOTIFIED THAT HE WAS ON THE WAITING LIST FOR MEMBERSHIP INTO TCC? ON WHAT DATE WAS HE PLACED ON THE WAITING LIST?

I do not know what, if any communication, has occurred between the club and the candidate in question. I do not know on what date this candidate was placed on the waiting list. As I have stated, I understand that the admissions process for this candidate was completed in the fall of 1992.



B) IF YOU DO NOT KNOW THE EXACT DATE, WAS HE PLACED ON THE LIST BEFORE OR AFTER THE ELECTION OF PRESIDENT CLINTON?

See answer to no. 5a.

C) IF AFTER THE ELECTION, WAS IT BEFORE OR AFTER YOUR NOMINATION AS ASSISTANT ATTORNEY GENERAL?

See answer to no. 5a.

D) EVEN THOUGH YOUR ASSOCIATE STATUS AT TCC DID NOT ALLOW YOU TO SPONSOR ANYONE TO BE A MEMBER, DID YOU EVER ENCOURAGE ANY AFRICAN AMERICANS TO JOIN? IF SO, PLEASE PROVIDE THEIR NAMES, ADDRESSES, AND PHONE NUMBERS.

I do not recall whether I encouraged any African American to join the club.

6. IN YOUR ANSWER 11 TO SENATOR PRESSLER'S QUESTIONS, YOU SAID THAT WHEN YOU RESIGNED FROM TCC, ONE OF YOUR REASONS FOR DOING SO WAS THAT, "THE COST OF MAINTAINING A NONRESIDENT OR INACTIVE MEMBERSHIP WAS RELATIVELY HIGH," AND THAT, "IT DID NOT SEEM 'WORTH IT' TO RETAIN ANY KIND OF MEMBERSHIP AT THE COUNTRY CLUB." LATER IN YOUR ANSWERS YOU REFERENCED TCC'S POLICY THAT FORMER MEMBERS MAY REAPPLY FOR MEMBERSHIP LIKE ANY OTHER NEW MEMBER AND COULD BE ADMITTED WHEN ANOTHER INITIATION FEE AND CURRENT DUES WERE PAID. YOU SUGGESTED THAT THE CLUB "RECONSIDER THE POLICY PARTICULARLY IN THE CASE OF PEOPLE GOING INTO PUBLIC SERVICE."

A) WHY SHOULD MEMBERS OF PRIVATE CLUBS WHO RESIGN AND SUBSEQUENTLY ENTER PUBLIC SERVICE BE AFFORDED MORE FAVORABLE READMISSION TREATMENT THAN SOMEONE WHO RESIGNS FOR REASONS UNRELATED TO PUBLIC SERVICE?

I did not say that they should. Factors which led me to raise the question about the club's policy are that individuals going into public service often experience significant reduction in income and frequently move away so that they are not able to use club facilities, even with a non-resident membership.

B) DO YOU PLAN ON REJOINING TCC UPON FINISHING YOUR POTENTIAL CAREER IN GOVERNMENT?

I do not know where I will live or work after my potential career in government, or whether I will apply to join The Country Club.

C) DID YOU DISCUSS WITH ANY TCC OFFICIAL ANY ARRANGEMENT FOR

## REJOINING TCC UPON FINISHING YOUR POTENTIAL GOVERNMENT CAREER?

No.

D) IN YOUR RESPONSE TO THE QUESTIONS OF JUNE 25, 1993, YOU WERE ASKED FOR A COPY OF YOUR LETTER OF RESIGNATION FROM TCC. WILL YOU PLEASE INSURE THAT A COPY IS DELIVERED TO THE JUDICIARY COMMITTEE?

Attached.

E) PLEASE CLEARLY RESTATE YOUR REASONS FOR RESIGNING FROM TCC BUT NOT FROM THE LONGWOOD CRICKET CLUB OR THE BADMINTON AND TENNIS CLUB. YOU HAVE STATED THAT YOU RESIGNED IN ANTICIPATION OF YOUR MOVE TO WASHINGTON, D.C. DID YOU RESIGN BECAUSE YOU FELT YOUR MEMBERSHIP AT TCC WAS POLITICALLY EMBARRASSING?

As I stated previously, I resigned from The Country Club because I had used that facility infrequently since 1987 and because the cost of maintaining a non-resident or inactive membership was relatively high, particularly as I doubted I would ever use the facility. I am primarily, if not exclusively, a competitive tennis player. As I have a bad left leg from polio and various therapeutic surgeries, I can really only play on clay, hartru or grass courts. Most clubs in the Boston area have some variety of "hard" surfaces, with the exceptions of Longwood, the Badminton and Tennis Club and a few others. I joined Longwood in 1978 in order to have someplace to play tennis in the summer. I joined the Badminton and Tennis Club sometime in the early 1980's in order to play tennis in the winter. I chose to join The Country Club not only because it also had a very competitive tennis and clay tennis courts, but also because I thought it would be fun to learn to play golf. Although I did play there a few times a summer in the early years of my membership, increasingly I did not have the time it takes to play golf and to practice. For example, in 1988 I did not play golf more than twice. In 1989 and 1990, I may have played once a summer. In 1991 and 1992, I did not play golf once and played tennis only a few times in 1991 and not once in 1992. In sum, it did not seem "worth it" to retain any kind of membership at The Country Club. I have retained inactive membership or non-resident status in the Longwood Cricket Club and in the Badminton and Tennis Club because these were memberships which I fully utilized and I could retain my place at minimal cost. I did not, as your question suggests, resign my membership at The Country Club because I thought it was politically embarrassing.

7. SENATOR KENNEDY HAS SUGGESTED THAT YOU ATTEMPTED TO RECRUIT AFRICAN AMERICAN MEMBERS WHILE YOU WERE AT TCC. YOUR EARLIER ANSWERS INDICATE THAT YOU DID NOT MAKE SUCH EFFORTS. TO CLARIFY YOUR POSITION ONCE MORE, PLEASE SUPPLY THE NAMES AND PHONE NUMBERS OF ANY AFRICAN AMERICANS THAT YOU ATTEMPTED TO RECRUIT FOR TCC I UNDERSTAND THAT YOUR ASSOCIATE MEMBERSHIP

STATUS DID NOT ALLOW YOU TO SPONSOR ANYONE TO BE A MEMBER. BUT SENATOR KENNEDY IS APPARENTLY SUGGESTING THAT YOU DID WORK TO RECRUIT MINORITIES. PLEASE SUPPLY THE NAMES, ADDRESSES, AND PHONE NUMBERS OF ANY AFRICAN AMERICANS YOU RECRUITED FOR MEMBERSHIP AT TCC.

I do not know to what you refer as far as comments by Senator Kennedy on my associate membership in The Country Club. Senator Kennedy is aware of and, I believe, has referenced my participation on the Diversity Committee at Longwood Cricket Club. With respect to the former club, as I have stated, I do not recall whether I discussed membership with the African American friend I had as a guest to play tennis, and, as I have also stated, I did not recruit any African Americans for membership.



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March 22, 1993

Frank Ellsworth, Treasurer  
The Country Club  
P. O. Box 619  
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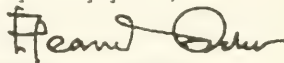
Dear Mr. Ellsworth:

Thank you for returning my call last week. Although I would have liked to discuss this matter with you over the telephone, in light of our difficulty connecting, I think it best simply to write.

I have been offered and have accepted a senior position with the United States Department of Justice in Washington, D.C. If nominated and confirmed, I will be moving to the Washington, D.C. area and thus have decided to resign my associate membership in The Country Club. I would like to make that resignation effective before I am obligated to pay any part of the upcoming assessment. Accordingly, on the assumption that I can resign by means of a letter such as this, I hereby resign my associate membership in The Country Club.

Thank you for your attention to this matter.

Very truly yours,



Eleanor D. Acheson

EDA/pe

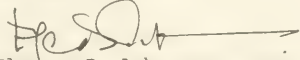
June 23, 1993

The Honorable Joseph R. Biden  
United States Senate  
Committee on the Judiciary  
Washington, D.C. 20510-6275

Dear Senator Biden:

Attached are my responses to the written questions that you submitted earlier today. I hope you will find them satisfactory. If I can provide any further information, please do not hesitate to contact me at (202) 514-2107.

Sincerely,

A handwritten signature in dark ink, appearing to read 'E. Acheson', followed by a long horizontal line extending to the right.

Eleanor D. Acheson

QUESTIONS FOR ELEANOR ACHESON FROM SENATOR BIDEN

IN AUGUST 1990, THE JUDICIARY COMMITTEE PASSED A RESOLUTION WHERE IT EXPRESSED THE SENSE OF THE COMMITTEE THAT IT WAS INAPPROPRIATE FOR JUDICIAL NOMINEES TO BE MEMBERS OF CLUBS WHERE BUSINESS WAS CONDUCTED IF THOSE CLUBS INVIDIOUSLY DISCRIMINATE ON THE BASIS OF RACE, SEX OR RELIGION IN THEIR MEMBERSHIP POLICIES.

IN YOUR COMMITTEE QUESTIONNAIRE YOU STATED YOU HAVE RESIGNED YOUR MEMBERSHIP FROM THE COUNTRY CLUB OF BROOKLINE, MASSACHUSETTS, AN ORGANIZATION THAT ALLOWED WOMEN FULL MEMBERSHIP PRIVILEGES ONLY A FEW YEARS AGO AND CURRENTLY HAS NO AFRICAN-AMERICAN MEMBERS. IT IS MY UNDERSTANDING THAT THE CLUB HAS ACCEPTED THE APPLICATION OF AN AFRICAN-AMERICAN FOR MEMBERSHIP BUT THAT INDIVIDUAL IS STILL ON THE WAITING LIST.

1. DOES THE COUNTRY CLUB INVIDIOUSLY DISCRIMINATE ON THE BASIS OF RACE, SEX, OR RELIGION?

No. It includes members of both sexes, Asian and Hispanic-Americans, as well as whites, Jews, Catholics and Protestants. African Americans have been invited to join, and one was admitted some months ago. Because the number of members of the club is limited at any one time, he, along with other recent admittees, is waiting for a slot to open. Guests of all races have frequented the club without experiencing any discrimination.

2. ARE YOU AWARE OF ANY AFRICAN-AMERICAN APPLICANTS FOR MEMBERSHIP IN THE COUNTRY CLUB WHO WERE TURNED DOWN FOR ADMISSION BY THE CLUB'S GOVERNING BOARD?

No.

3. COULD YOU EXPLAIN TO THE COMMITTEE THE CIRCUMSTANCES UNDER WHICH YOU RESIGNED FROM THE CLUB?

I resigned from the club in March 1993 because I anticipated moving to Washington, D.C. I had not used this facility at all in 1993, used it only one time in 1992, and only a few times in each of 1990 and 1991. Thus, I saw no reason to continue my association with the club, particularly as non-resident status is still relatively costly.

4. WHAT IS YOUR VIEW OF THE JUDICIARY COMMITTEE'S RESOLUTION?

I fully support the Judiciary Committee's resolution. Membership in clubs that discriminate on the basis of race, ethnicity, religion, gender, or disability by persons who wish to become Judges or Justice Department officials undermines public confidence in the fairness of the legal system.



June 29, 1993

The Honorable Orrin G. Hatch  
United States Senate  
Committee on the Judiciary  
Washington, D.C. 20510

Dear Senator Hatch:

Attached are my responses to the written questions that you recently submitted. I hope you will find them satisfactory. If I can provide any further information, please do not hesitate to contact me at (202) 514-2107.

Sincerely,

A handwritten signature in dark ink, appearing to read "Eleanor D. Acheson", followed by a horizontal line.

Eleanor D. Acheson

## QUESTIONS FOR ELEANOR D. ACHESON FROM SENATOR HATCH

1. PLEASE IDENTIFY ALL PARTICIPANTS, BOTH INDIVIDUAL AND INSTITUTIONAL, IN THE JUDICIAL SELECTION PROCESS FOR THE CLINTON ADMINISTRATION, AND PLEASE DESCRIBE THEIR RESPECTIVE ROLES IN THAT PROCESS.

At the Department of Justice, the Attorney General, the Deputy Attorney General, the Associate Attorney General, and I will be primarily involved, as will others in my office, if I am confirmed. Numerous officials at the Federal Bureau of Investigations will also be involved in reviewing the background of judicial nominees. At the White House, primary responsibility will be exercised by White House Counsel Bernard Nussbaum, and others on his staff.

2. WILL YOU BE SEEKING TO RECOMMEND THAT THE PRESIDENT NOMINATE INDIVIDUALS TO THE FEDERAL COURTS WHO SEE THEIR DUTY AS A JUDGE TO INTERPRET THE LAWS AND CONSTITUTION AS WRITTEN, ACCORDING TO THEIR ORIGINAL MEANING?

We will seek nominees who will be committed to faithfully applying the laws and Constitution as interpreted by the United States Supreme Court.

3. WHAT WILL BE YOUR RELATIONSHIP TO THE CONGRESS WITH REGARD TO THIS PROCESS? FOR EXAMPLE, PRESIDENT CARTER REQUIRED SENATORS FROM HIS PARTY TO ESTABLISH "MERIT SELECTION" COMMITTEES AND PRESIDENT REAGAN REQUIRED SENATORS TO SUBMIT THE NAMES OF THREE TO FIVE CANDIDATES FOR DISTRICT COURT POSITIONS. WILL YOU REQUIRE SENATORS TO SET UP COMMISSIONS? IF SO, WILL THOSE COMMISSIONS BE BIPARTISAN AND WHO WILL SELECT THEM?

Senators will not be required to utilize commissions.

4. WILL YOU REQUIRE SENATORS TO SUBMIT A MINIMUM NUMBER OF NAMES FOR THE PRESIDENT'S CONSIDERATION?

We will not require Senators to submit a minimum number of names.

5. WHAT IF THE SENATOR REFUSES TO COMPLY?

N/A

6. WHAT IF A SENATOR SUBMITS THE MINIMUM NUMBER OF NAMES BUT CALLS YOUR OFFICE AND INDICATES THAT HE OR SHE WANTS ONE OF THE CANDIDATES SELECTED?

N/A

7. WHAT DO YOU ANTICIPATE THE ROLE OF CONGRESS TO BE IN THE SELECTION OF CIRCUIT COURT JUDGES? FOR EXAMPLE, PRESIDENTS REAGAN AND BUSH GAVE LITTLE DEFERENCE TO SENATORS IN THE SELECTION OF CIRCUIT COURT JUDGES.

We will consider candidates for the Court of Appeals recommended to the President from a wide range of individuals, including United States Senators.

8. WHAT ARE YOUR STANDARDS FOR ALLOCATING CIRCUIT COURT POSITIONS TO STATES LOCATED WITHIN THE CIRCUIT? FOR EXAMPLE, WOULD IT BE A FACTOR THAT ONE STATE COMPETING FOR A SEAT HAS TWO SENATORS FROM THE PRESIDENT'S PARTY AND ANOTHER COMPETING STATE DOES NOT?

We will consider historical practice, state-by-state judicial workload, and other factors of judicial administration in making such allocations.

9. WILL THE WHITE HOUSE INITIATE NAMES FOR JUSTICE DEPARTMENT CONSIDERATION OR VICE VERSA?

Candidates for consideration will likely come from a variety of sources, including Senators, Congressmen, officials at the Justice Department and the White House, the public and private bar, constituency groups, and members of the general public.

10. WHAT INDIVIDUALS, AS A PRACTICAL MATTER, WILL DETERMINE THE NAMES TO BE SUBMITTED TO THE FBI AND ABA FOR BACKGROUND REVIEW?

The President.

11. WILL YOU PERSONALLY INTERVIEW ALL CANDIDATES FOR DISTRICT AND CIRCUIT COURT JUDGESHIPS?

No.

12. WILL ANYONE ELSE IN THE JUSTICE DEPARTMENT INTERVIEW JUDICIAL CANDIDATES? IF SO, PLEASE IDENTIFY THESE PERSON(S) AND THEIR OFFICES.

Yes. It is possible that the Attorney General, and from time to time, the Deputy Attorney General or the Associate Attorney General will interview judicial candidates.

13. WILL ANYONE IN THE WHITE HOUSE INTERVIEW ALL OR MOST CANDIDATES? IF SO, PLEASE IDENTIFY THESE PERSON(S).

Candidates for Courts of Appeal positions are likely to be interviewed by the White House



Counsel or members of his staff.

14. HOW MANY SEPARATE INTERVIEWS CAN THE TYPICAL JUDICIAL CANDIDATE LOOK FORWARD TO IN WASHINGTON?

As a general rule, we would anticipate one round of interviews.

15. WHAT INDIVIDUALS OR ORGANIZATIONS WOULD YOU EXPECT TO CONSULT FROM A JUDICIAL CANDIDATE'S STATE IN EVALUATING HIS OR HER QUALIFICATIONS?

Among others, local practitioners, judges and bar associations, and entities for which the candidate served in a civic, legal or pro bono capacity.

16. IF A JUDICIAL CANDIDATE IS FOUND TO BE "NOT QUALIFIED" BY THE ABA IN ITS REVIEW PROCESS, WOULD YOU RULE OUT RECOMMENDING THAT THE PRESIDENT NOMINATE THAT PERSON?

If I believed that the ABA rating was unfair or unfounded, I would recommend that we proceed. I cannot imagine this occurring.

17. WILL YOU BE PREPARED TO LOBBY THE ABA IN THE COURSE OF ITS EVALUATION PROCESS IF YOU ARE GIVEN ANY INDICATION THAT THEY MAY BE HEADED IN THE DIRECTION OF A "NOT QUALIFIED" RATING FOR A JUDICIAL CANDIDATE? IF SO, WHAT TYPE OF LOBBYING IN YOUR JUDGEMENT IS APPROPRIATE, AND WHAT IS INAPPROPRIATE?

With respect to the ABA, it would be appropriate to respond to requests on their part for information about a nominee; to respond to a nominee's concerns of bias or prejudice on the part of a particular ABA reviewer; and to urge the ABA to contact a full range of individuals who are familiar with the candidate when reviewing that candidate's qualifications.

18. AS YOU KNOW, THE U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA AND THE U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT HAVE AN UNUSUAL ROLE IN OUR FEDERAL SYSTEM; THEY ARE EFFECTIVELY NATIONAL COURTS IN MANY RESPECTS BECAUSE OF THE UNIQUE JURISDICTION THAT THEY HAVE BEEN GIVEN BY CONGRESS. ARE YOU PREPARED TO GIVE THE DELEGATE OR "SHADOW SENATORS" FROM THE DISTRICT OF COLUMBIA THE SAME ROLE AS SENATORS FROM THE STATES IN RECOMMENDING CANDIDATES FOR SEATS ON THESE COURTS?

The administration is consulting with numerous persons in the District of Columbia, including Delegate Eleanor Holmes Norton.

19. WILL YOU GIVE ANY PREFERENCE FOR RESIDENTS OF THE DISTRICT OF COLUMBIA OR MEMBERS OF THE D.C. BAR FOR SEATS ON THESE COURTS?

Yes.

20. DO YOU EXPECT TO CREATE ANY SYSTEM BY WHICH REPUBLICAN SENATORS ARE REGULARLY CONSULTED ON JUDICIAL APPOINTMENTS IN THEIR STATES? IF SO, WHAT PROCEDURES WOULD YOU ANTICIPATE?

We will be happy to receive recommendations from Republican Senators for judicial vacancies. Recommendations from Republican Senators may be made to the White House Counsel's office or to my office.

21. SUPPOSE A JUDICIAL CANDIDATE TOLD YOU IN AN INTERVIEW THAT IF FACED WITH CONFLICT BETWEEN HIS OR HER OWN CONSCIENCE AND THE LETTER OF THE LAW, THE CANDIDATE WOULD HAVE TO RESOLVE THE ISSUE THROUGH RESORT TO THEIR OWN CONSCIENCE. WOULD YOU BE TROUBLED BY SUCH A STATEMENT?

Yes.

WOULD YOU RECOMMEND THAT THE CANDIDATE BE APPOINTED TO THE FEDERAL BENCH?

No.

22. WOULD YOU RECOMMEND THE APPOINTMENT OF A JUDGE WHO INDICATED TO YOU THAT HIS OR HER CONSCIENCE PREVENTED THEIR PARTICIPATION IN THE IMPOSITION OF THE DEATH PENALTY OR SOME OTHER SANCTION PROVIDED FOR BY THE CRIMINAL LAW?

No.

23. PLEASE DESCRIBE THE JUDICIAL PHILOSOPHY THAT THE CLINTON ADMINISTRATION WILL BE SEEKING IN ITS JUDICIAL NOMINEES AS IT SCREENS CANDIDATES.

The Clinton Administration will be seeking judicial nominees with a high standard of excellence, integrity, professional maturity and other qualities suggesting good judicial temperament and ability, and above all, a commitment to follow the law.

24. IN THE CONTEXT OF INTERVIEWING JUDICIAL CANDIDATES, IS IT PROPER TO ASK CANDIDATES ABOUT THEIR JUDICIAL PHILOSOPHY?

I do not envision asking candidates such questions.

25. IS IT PROPER TO ASK JUDICIAL CANDIDATES ABOUT LIKELY FUTURE JUDICIAL CONTROVERSIES?

No.

26. IS IT PROPER TO ASK JUDICIAL CANDIDATES HOW THEY WOULD HAVE RULED IN PREVIOUS JUDICIAL CONTROVERSIES?

If by this you mean cases in which the candidate did not participate, my answer is no.

27. WOULD YOU CONSIDER IT PROPER TO ASK JUDICIAL CANDIDATES ABOUT THEIR POLICY VIEWS OF CONTEMPORARY SOCIAL ISSUES, SUCH AS ABORTION, SCHOOL PRAYER, AFFIRMATIVE ACTION, AND BUSING? WOULD YOU CONSIDER IT PROPER TO ASK JUDICIAL CANDIDATES ABOUT THEIR LEGAL VIEWS OF THE SUPREME COURT DECISIONS IN THOSE AREAS?

No.

28. HAS THE ADMINISTRATION BEGUN INTERVIEWING JUDICIAL CANDIDATES? HAVE YOU PARTICIPATED IN THOSE INTERVIEWS? WHAT QUESTIONS HAVE BEEN ASKED OF CANDIDATES?

No.

29. THE CARTER ADMINISTRATION MERIT SELECTION PANELS ASKED JUDICIAL CANDIDATES ABOUT THEIR POLICY VIEWS OF SPECIFIC SOCIAL ISSUES. ARE YOU PREPARED TO URGE SELECTION COMMITTEES AND SENATORS TO AVOID THESE KINDS OF QUESTIONS IN CHOOSING WHICH NAMES TO SEND TO THE ADMINISTRATION? IF SO, IN WHAT FORM WOULD YOU DO THIS?

The President has urged Senators of his Party to recommend candidates with a high standard of excellence, integrity, professional maturity, and other qualities suggesting good judicial temperament and ability, and above all, a commitment to follow the law.

30. COULD A JUDICIAL CANDIDATE WHOSE WRITINGS OR OTHER PUBLIC PRONOUNCEMENTS INDICATED STRONG OPPOSITION TO ROE V. WADE AS A MATTER OF CONSTITUTIONAL LAW PASS MUSTER IN THIS ADMINISTRATION? WHAT IF A JUDICIAL CANDIDATE HAD NOT PREVIOUSLY EXPRESSED A VIEW OF THE CONSTITUTIONAL MERITS OF ROE, BUT HAD EXPRESSED OPPOSITION TO ABORTION AS A MATTER OF POLICY. COULD THAT CANDIDATE PASS MUSTER IN THIS ADMINISTRATION?

See below.

31. IF A JUDICIAL CANDIDATE'S RECORD IS UNCLEAR ON WHAT HIS OR



HER CONSTITUTIONAL AND/OR POLICY VIEWS OF ABORTION ARE, WILL YOU OR OTHER INTERVIEWERS ASK A JUDICIAL CANDIDATE WHAT THOSE VIEWS ARE?

See below.

32. IF YOU DETERMINED THAT A JUDICIAL CANDIDATE BELIEVED THAT THE MIRANDA DECISION, REQUIRING SPECIFIC POLICE WARNINGS BEFORE PROCEEDING WITH CUSTODIAL INTERROGATION, WAS CONSTITUTIONALLY UNSOUND, EVERYTHING ELSE BEING EQUAL, WOULD YOU BE MORE OR LESS FAVORABLY DISPOSED TOWARD THAT CANDIDATE?

See below.

33. IF YOU DETERMINED THAT A JUDICIAL CANDIDATE BELIEVED THAT CAPITAL PUNISHMENT WAS ALWAYS UNCONSTITUTIONAL, EVERYTHING ELSE BEING EQUAL, WOULD YOU BE MORE OR LESS FAVORABLY DISPOSED TOWARD THAT CANDIDATE?

See below.

34. IF YOU DETERMINED THAT A JUDICIAL CANDIDATE BELIEVED THAT THE CONSTITUTION BROADLY GUARANTEED A MINIMUM LEVEL OF BASIC SOCIAL SERVICES SUCH AS HOUSING MEDICAL CARE, AND WELFARE, EVERYTHING ELSE BEING EQUAL, WOULD YOU BE MORE OR LESS FAVORABLY DISPOSED TOWARD THAT CANDIDATE?

See below.

35. IF YOU DETERMINED THAT A JUDICIAL CANDIDATE BELIEVED THAT THE FEDERAL CIVIL RIGHTS LAWS AS WRITTEN FORBID RACIAL AND GENDER PREFERENCES, EVERYTHING ELSE BEING EQUAL, WOULD YOU BE MORE OR LESS FAVORABLY DISPOSED TOWARD THAT CANDIDATE?

Answer to questions 30-35:

With respect to any such legal policy view, we would seek only to insure that the nominee would faithfully apply the law and precedents of the United States Supreme Court. No litmus tests will be applied. If a nominee can faithfully apply precedent and the law, his or her positions on any of these questions would not be relevant to our consideration of his or her candidacy.

36. IN YOUR VIEW, WOULD IT BE APPROPRIATE AT THIS TIME OR IN THE FUTURE FOR THE ADMINISTRATION TO FORMALLY OR INFORMALLY USE OUTSIDE LAWYERS OR GROUPS, OTHER THAN THE AMERICAN BAR ASSOCIATION, IN THE SCREENING PROCESS FOR JUDICIAL CANDIDATES?

See below.

37. IF THE ADMINISTRATION FORMALLY OR INFORMALLY USES OUTSIDE LAWYERS OR GROUPS, OTHER THAN THE AMERICAN BAR ASSOCIATION, TO SCREEN JUDICIAL CANDIDATES, WILL YOU PROVIDE THE CHAIRMAN AND RANKING MEMBER OF THE JUDICIARY COMMITTEE THE IDENTITIES OF SUCH LAWYERS AND/OR GROUPS, AND A DESCRIPTION OF THEIR ROLES?

Answer to questions 36-37:

We will not use outside lawyers in the formal evaluation process.

As you know, for some time, the Senate Judiciary Committee has informally contacted lawyers in the process of reviewing judicial nominees. This includes contacting lawyers in a nominee's community to assess his or her fitness, or meeting or discussing with lawyers who support or oppose that nominee such nominee's qualifications. Some members of the Committee have sought the counsel of outside lawyers in preparing for their review of judicial nominations--asking outside lawyers to read the opinions or writings of a nominee, and offering views and insights about those materials.

Our use of outside lawyers will be consistent with this tradition established by the Judiciary Committee. We will consider any request for the names of those contacted concerning a potential nominee, consistent with sound investigative practices in disclosing such names.

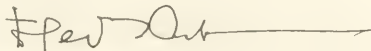
June 29, 1993

The Honorable Alan K. Simpson  
United States Senate  
Committee on the Judiciary.  
Washington, D.C. 20510

Dear Senator Simpson:

Attached are my responses to the written questions that you submitted yesterday. I hope you will find them satisfactory. If I can provide any further information, please do not hesitate to contact me at (202) 514-2107.

Sincerely,

A handwritten signature in dark ink, appearing to read "Eleanor Acheson", with a long horizontal flourish extending to the right.

Eleanor D. Acheson



Answers of Eleanor D. Acheson to Questions  
Submitted by Senator Simpson  
June 28, 1993

Q: I assume your office will be reviewing all major policy initiatives of the Justice Department and its components, including the Immigration and Naturalization Service. I am interested in knowing the views of the Department on the "expedited inspections" bill which addresses the problem we are facing at our airports with aliens arriving with no documents or fraudulent documents and then claiming asylum.

A: The Department of Justice supports in principle the concept of a procedure for expedited exclusion at our ports of entry which does not jeopardize the rights of bona fide refugees. As part of President Clinton's recent initiative to address problems with illegal immigration in the context of criminal alien smuggling, the Justice Department is finalizing work on draft legislation on this issue. There is general consensus that to be effective expedited exclusion legislation must contain a meaningful threshold standard for review, provide for interviews by specially trained asylum officers and for limited review.

Q: What will be the relationship between the Office of Policy Development and the Office of Legal Counsel?

A: The Office of Policy Development will act as the Attorney General's principal policy adviser, while the Office of Legal Counsel serves as the Attorney General's legal adviser. These offices, therefore, play distinct roles and their relationship is complementary. Attorney General Reno clearly recognizes that in order for the Office of Legal Counsel to give balanced and reliable legal advice, it is necessary for that office to remain independent.

Q: What policies are being developed by Justice to address the illegal alien problem? Is there any consideration of INS/Coast Guard patrol off the coast and elsewhere to intercept the Chinese alien smugglers?

A: The Department of Justice in conjunction with an interagency group is finalizing proposed legislation which would significantly enhance the Department's ability to investigate and prosecute criminal alien smuggling activity. These provisions will include a proposal to increase criminal penalties for such activities, to include alien smuggling as a RICO predicate, and to expand other investigatory tools. The INS and Coast Guard have worked very closely in intercepting boats sponsored by alien smugglers in and outside of territorial waters. This cooperation will continue.

June 29, 1993

The Honorable Charles Grassley  
United States Senate  
Committee on the Judiciary  
Washington, D.C. 20510

Dear Senator Grassley:

Attached are my responses to the written questions that you recently submitted. I hope you will find them satisfactory. If I can provide any further information, please do not hesitate to contact me at (202) 514-2107.

Sincerely,

A handwritten signature in dark ink, appearing to read 'E. D. Acheson', with a long horizontal flourish extending to the right.

Eleanor D. Acheson

QUESTIONS FOR ELEANOR D. ACHESON FROM SENATOR CHARLES E. GRASSLEYAMERICAN BAR ASSOCIATION

1. WHAT ROLE DO YOU FORESEE FOR THE AMERICAN BAR ASSOCIATION, THROUGH ITS STANDING COMMITTEE ON THE FEDERAL JUDICIARY, IN THE SELECTION OF FEDERAL JUDGES?

Candidates recommended to the President for federal judgeships will be referred to the ABA Committee on the Federal Judiciary for evaluation.

2. HOW WILL THE ROLE DIFFER, AS BETWEEN THE SELECTION OF DISTRICT JUDGES AND CIRCUIT COURT OF APPEALS JUDGES?

I do not believe the ABA's role will differ.

3. ARE YOU AWARE OF THE CHANGES, THROUGH THE 1980'S IN THE ABA'S CRITERIA FOR EVALUATING POTENTIAL JUDICIAL NOMINEES? IN 1977, THE ABA, IN ITS GUIDELINES, STATED:

THE COMMITTEE DOES NOT ATTEMPT TO INVESTIGATE OR REPORT ON POLITICAL OR IDEOLOGICAL MATTERS WITH RESPECT TO PROSPECTIVE NOMINEES.

IN 1980, THE ABA MODIFIED ITS GUIDELINES AS FOLLOWS:

THE COMMITTEE DOES NOT INVESTIGATE THE PROSPECTIVE NOMINEE'S POLITICAL OR IDEOLOGICAL PHILOSOPHY, EXCEPT THAT EXTREME VIEWS ON SUCH MATTERS MIGHT BEAR UPON THE JUDICIAL TEMPERAMENT OR INTEGRITY.

A FEW YEARS LATER, THE GUIDELINE WAS FURTHER MODIFIED:

POLITICAL OR IDEOLOGICAL PHILOSOPHY ARE NOT CONSIDERED, EXCEPT TO THE EXTENT THAT THEY MAY BEAR UPON THE OTHER FACTORS.

THE CHAIRMAN OF THIS COMMITTEE, SENATOR BIDEN, HELD A HEARING IN 1989 ON THE ROLE OF THE ABA IN JUDICIAL NOMINATIONS. THE RESULT WAS AN UNDERSTANDING BETWEEN THIS COMMITTEE, THE ABA AND THE ADMINISTRATION THAT POLITICS AND IDEOLOGY WOULD NO LONGER AFFECT THE ABA'S EVALUATIONS. I WOULD PERSONALLY PREFER THAT THE ABA NOT BE GRANTED THE SPECIAL STATUS IT HAS IN THE NOMINATION PROCESS. BUT AT A MINIMUM, WE MUST ENSURE THAT POLITICS AND IDEOLOGY PLAY NO ROLE. WHAT ASSURANCES CAN YOU GIVE ME THAT THE ABA WON'T BE ALLOWED TO PLAY POLITICS WITH THE JUDICIAL NOMINATION PROCESS?

We do not have any expectation that politics will play a role in the ABA's evaluation process.



## LETTERS IN SUPPORT OF ELEANOR ACHESON

Beacon  
Management  
Company

**Marilyn Swartz Lloyd**  
President

June 14, 1993

Senator Joseph R. Biden, Jr.  
Chairman  
Senate Judiciary Committee  
221 Russell Senate Office Building  
Washington, D. C. 20510-0802

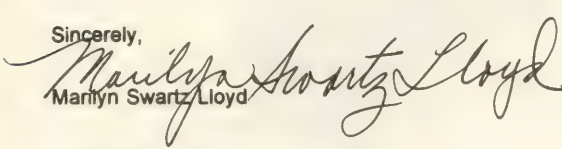
Dear Senator Biden:

I am writing to express my strong support for the confirmation of Eleanor Dean Acheson as Assistant Attorney General of the United States.

Ms. Acheson is an attorney of the highest integrity, a very thoughtful woman who is concerned both with policies and the effects they have on individuals. She is a brilliant analyst, someone this country cannot afford to lose in helping to guide it. She shares the President's priorities and the issues so important to every individual. Last year I had the privilege and pleasure of working with her during the presidential campaign where she demonstrated her abundant energy and her very effective organizational and communication skills. Her reputation as an attorney is impeccable and she has spent countless pro bono hours with charitable and non-profit organizations.

We as Democrats need the extraordinary talents of Ms. Acheson to work for us in this administration.

Sincerely,

  
Marilyn Swartz Lloyd

MSL:cm  
cc. Senator Edward M. Kennedy

## Nevada and California Interstate Mexican Baptist Convention Inc.

Vice President-At-Large  
Rev. Joshua Davine

2nd Vice President — Rev. Willie Davis  
3rd Vice President — Rev. Albert Rollins

REV. JAMES M. ROGERS, SR.  
PRESIDENT

1100 NORTH "D" STREET  
LAS VEGAS, NV 89106  
TEL. (702) 648-6436 or 398-3434

Secretary - Rev. Chester C. Richardson  
Treasurer - Rev. Francis Hardy  
Finance Secretary - Rev. William C. Webb

June 16, 1993

The Honorable Joseph Biden  
Chairman, Senate Judiciary Committee  
United States Senate  
224 Dirsen Building  
Washington, D.C. 20510

RE: Confirmation of Nomination of Eleanor Acheson

Dear Chairman Biden and Committee Members:

It is with great pleasure that I write to you and the members of the Senate Judiciary Committee in support of the nomination of Ms. Eleanor "Ellie" Acheson for Assistant Attorney General.

I was in Washington, D.C. several days ago and had the pleasure of meeting Ms. Acheson. There is no doubt in my mind that she is committed and well informed on the pressing issues that will address the office she has been nominated for.

Ms. Acheson comes from a family where she is well seeded in public service. Her education and private professional practice also speaks to her ability to succeed.

It is my prayer that you will give Ms. Acheson an affirmative vote of confidence to make a greater service to our nation.

Please feel free to contact me if I can be of further assistance in this matter.

*Richardson*  
REVEREND CHESTER C. RICHARDSON  
General Secretary NV/CA  
Interstate Baptist Convention

cc: Senator Harry Reid  
Senator Richard Bryan

CRida

Department of Political Science



## Wellesley College

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106 Central Street  
 Wellesley, Massachusetts 02181-8256  
 (617) 283-2194 FAX (617) 283-3639

June 17, 1993

Senator Joseph R. Biden Jr.  
 224 Dirksen Building  
 United States Senate  
 Washington, D.C. 20510

Dear Senator Biden,

I am writing to urge you to support the nomination of Eleanor Acheson as Assistant Attorney General when she appears before the Senate Judiciary Committee. I recognize that Eleanor's past membership in the Country Club of Brookline appears to have raised some concerns about her commitment to civil rights for all Americans, but I want to reassure you that it would be a terrible loss for the country if she is not confirmed.

I have known Eleanor since 1966, when she was my student at Wellesley College. She took several courses with me, including Constitutional Law, and I remember clearly that she was outspoken in her commitment to individual rights. Moreover, Eleanor acted on her values, even as an undergraduate, and helped lead the College in a progressive direction. Through her efforts, and those of Hillary Rodham Clinton, other students and faculty members, the College began an aggressive affirmative action effort in the late 1960's.

I have observed Eleanor's professional career closely in the past two decades and can attest to the fact that she has been a leading proponent of women's and minority rights in the Boston area. She has devoted serious time and effort to advancing progressive causes, sometimes at her own expense. As Assistant Attorney General she will continue to pursue these life-long commitments. I urge you to support her.

Sincerely,

*Alan Schechter*  
 Alan Schechter  
 Professor



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June 18, 1993

BY TELECOPY (202) 224-9516

Hon. Joseph R. Biden, Jr.  
Chairman, Senate Judiciary Committee  
SR-221 Russell Senate Office Building  
Washington, DC 20510

Re: Eleanor D. Acheson, Nominee for Assistant Attorney  
General for Policy Development

Dear Senator Biden:

I write to offer my support for confirmation of Eleanor Dean Acheson, nominee for the position of Assistant Attorney General for Policy Development. I know Eldie well as a prominent member of the Boston legal community who has made her time and her talent available to less fortunate and disenfranchised citizens.

As you may know, Ms. Acheson has been a long-time director of Roxbury Community College, which is not only the only junior college in the predominately black neighborhood of Roxbury, but which is itself a symbol of hope and upward mobility for African-Americans in this area. Ms. Acheson has also been involved since its inception with Women Incorporated, a drug treatment intervention program for women based in Roxbury. Through these and other initiatives in the community, Ms. Acheson has demonstrated her commitment to addressing in specific and constructive ways the suffering disproportionately borne by African-Americans in Boston. She has also demonstrated a view of herself as truly a citizen of the whole community.

Thus, it was with some dismay that I learned of concerns about her membership in a private country club in Brookline, from which she resigned this spring. I am familiar with the club, have been a guest there on many occasions, and have even been invited three times to join. As a product of the south side of Chicago, I still find it difficult to imagine myself as a golfer, and so have chosen to decline. But if I am any indication, the

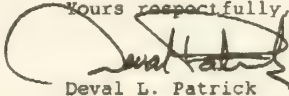
HILL  
&  
BARLOW

Hon. Joseph R. Biden, Jr.  
June 18, 1993  
Page 2

club does not have a commitment to the exclusion of African Americans. Although membership certainly appears to have been rather narrow in the past, I understand that I am not alone among African-Americans in having been invited to join.

In light of her professional record, I hope that Ms. Acheson's one-time membership in this country club will not be disqualifying, and that you will join in supporting her confirmation.

Yours respectfully,

A handwritten signature in dark ink, appearing to read "Deval Patrick", is written over the typed name. The signature is stylized with a large loop at the beginning and a flourish at the end.

Deval L. Patrick

DLP:kcr  
patd/ogb

Dani Monroe  
16 Woodcrest Rd.  
Westboro, MA 01581  
June 15, 1993

Jeff Blattner  
U.S. Senator Edward Kennedy's Office

Dear Mr. Blattner:

As a woman of color, I fully and without any hesitation support Eleanor D. Acheson's nomination for Assistant Attorney General Office of Policy Development.

In the two years that I've known Ms. Acheson she has worked diligently at including women of color in major political, social and civic activities in the Boston area. She has personally supported me during a significant life crisis and constantly advocates for women of color to be seen and heard in public forums.

Her participation on the Roxbury Community College Board, an institution in the African American community, predominately attended by African American students speaks to her dedication of fostering a better society for all. In addition, Ms. Acheson served on the Board for Women Inc.- an organization dedicated to raising funds for women.

In my opinion, Eleanor's membership in the Brookline County Club does not interfere in her personal and professional commitment to society. It would be preposterous to decline her nomination on such a superficial issue.

I trust you will make the right decision.

Sincerely,



Dani Monroe





*The Commonwealth of Massachusetts*

*University of Massachusetts - Boston*

*Downtown Center*

*Boston, Massachusetts 02125*

*June 16, 1993*

*Honorable Edward M. Kennedy*

*U. S. Senate*

*Attn: Mr. Blatten.*

*Dear Sir*

*I have known Mrs. Acheson for the past 16 years. My knowledge of her is based on our membership of a community self-help project in Roxbury.*

*Mrs. Acheson served tirelessly, she is committed to the cause of civil rights and diversity.*

*Her work in this poor, inner city community for over 15 years is testament to her sincerity.*

*Her skills are exceptional.*

*Lean T. Griffin*



# Action for Boston Community Development Inc.

175 TREMONT STREET, BOSTON, MASSACHUSETTS 02111-1000  
TELEPHONE AREA CODE (617) 687-9000 FAX: (617) 687-8041

June 18, 1993

The Honorable Edward M. Kennedy  
Senate Judiciary Committee  
315 Russell Senate Office Building  
Washington, D.C. 20510-2101

Dear Senator Kennedy,

As President/CEO of the diverse, community-based Action for Boston Community Development (ABCD) and a long-standing advocate of equal rights for disenfranchised persons of every race and ethnic background, I am writing to extend my full and unqualified support for Eleanor Dean Acheson, currently nominated for an assistant attorney general post.

I have known Eldie Acheson for many years and she has always commanded my utmost respect for her wide-ranging legal talent and her strong commitment to civil rights. She has worked with ABCD and many community agencies providing strong advocacy and support for issues important to minority and disenfranchised people and communities.

The American people are indeed fortunate to have a lawyer of Eldie Acheson's demonstrated skill and commitment to civil rights nominated to this important post. I urge her speedy confirmation.

Sincerely,

Robert M. Coard  
President/CEO

cc: Eleanor Dean Acheson

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EXECUTIVE DIRECTOR  
CLUB H. HOUSE  
OF REPRESENTATIVES  
SANDY HARTNETT, JR.  
NEW YORK, N.Y.  
\*1980-1981  
\*1982-1983  
\*1984-1985

June 17, 1993

BY TELEFAX AND FIRST CLASS MAIL  
(202) 224-2626

The Honorable Carol Moseley Braun  
United States Senator  
320 Hart Building  
Washington, D.C. 20510

Dear Senator Braun:

I am writing to express strong and enthusiastic support for the nomination of Eleanor Dean Acheson for the position of Assistant Attorney General, Office of Policy Development.

As an activist in civil rights and civil liberties causes (I am a former President of the Massachusetts Civil Liberties Union (CLUM), a member of the governing bodies of the CLUM and the Lawyers Committee for Civil Rights under the Law, and counsel for the Boston Chapter of the NAACP in one of the leading fair housing cases in the country), I consider it of utmost importance that Justice Department lawyers have a demonstrated record of commitment to civil rights and civil liberties. It is without any hesitation that I report to you that Ms. Acheson has not only a demonstrated, but a distinguished, record of such commitment.

She has been instrumental in mobilizing the resources of both her own firm and of the organized bar as a whole for providing pro bono legal representation to victims of racial and other invidious discrimination and to advocates of civil rights and civil liberties law reform. By serving both on her firm's and the Boston Bar Association's pro bono committees, in addition to taking on such cases herself, she has given the investment of her own time and energy an enormous multiplier effect.

In addition to her lawyerly pro bono efforts, Ms. Acheson has for many years been intimately involved with important social service and educational institutions -- most notably Women, Inc., and Roxbury Community College -- that on a daily basis struggle



SUGARMAN, ROGERS, BARSHAK &amp; COHEN, P.C.

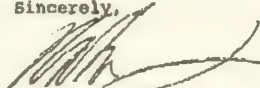
Letter to The Honorable Carol Mosley Braun  
June 17, 1993

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with the ravaging impact of racial and other discrimination on people of color in our community. Through this practical experience, she has developed a concrete understanding of both the nature of, and effective remedies for, civil rights problems. This understanding has enhanced her work as a public interest attorney and, I am confident, will enhance her work in the Justice Department, if confirmed.

I am enormously proud that an outstanding member of our community has been nominated for this position and strongly urge you to vote for her confirmation.

Sincerely,

  
Natasha E. Lisman

NCL/gv-48970

CC: BY TELEFAX AND FIRST CLASS MAIL  
565-3183The Honorable Edward M. Kennedy  
United States Senator  
2400 JFK Federal Building  
Boston, MA 02203

Honorable Carol Moseley Braun  
 United States Senate  
 Washington, DC

Dear Senator Braun:

I understand that some questions have been raised about Eleanor Acheson's membership in the Brookline Massachusetts Country Club in connection with her being considered for a post in the Justice Department. I am writing to you as an African American woman who has been a guest at The Country Club and as a person who knows Eleanor (Elde) Acheson well.

As a commercial real estate developer in Boston and active on several corporate and not for profit Boards, I frequent many of Boston's meeting places and dining rooms. I am often (unfortunately) the only or one of few persons of color in the room. I know from experience when a place is hostile. This Spring, I was a member of a committee to raise funds for the renovation of the Boston Public Library. We met at The Country Club. It is NOT a racially hostile place. I would like to state for the record that during my visits there I was always treated with the utmost respect and dignity and was accorded every courtesy that was extended to other guests. I would have absolutely no qualms about returning there. In my opinion, it is as open and non discriminating as any other meeting place in this community...albeit slightly rarefied even a bit dowdy. They still serve iceberg lettuce salads and sandwiches that have the crusts cut off!

I know Elde Acheson to be a woman who has committed herself to eliminating the barriers that divide our community. She has devoted her considerable talents to the Board of the Roxbury Community College, for example. This institution serves a predominantly low income African American and Hispanic student body from Boston's inner city. She has also been active with Women Inc., a social service and training organization for at risk women.

By her deeds, Eleanor Acheson has shown herself to be committed to the principles of equal access and equal opportunity for all people. In my opinion, she is precisely the kind of person our country needs in the Justice Department. I urge you to do all that you can to facilitate her confirmation.

Sincerely,

Roslyn M. Watson  
 25 Braddock Park  
 Boston, MA 02116-5816





# NOMINATION OF DORIS M. MEISSNER TO BE COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE

THURSDAY, SEPTEMBER 30, 1993

U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The committee met, pursuant to notice, at 2:13 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Edward M. Kennedy presiding.

Also present: Senators Feinstein, Hatch, Thurmond, and Simpson.

## OPENING STATEMENT OF SENATOR KENNEDY

Senator KENNEDY. We will come to order. I apologize for being a few minutes late. I was chairing a health hearing and it involved a very telling emotional story by a witness and I wanted to make sure that that witness was accorded the courtesies that a chairperson ought to have. So I apologize to my colleagues.

I know there are some time constraints, and I have a very brief opening statement. I know my colleague, Senator Hatch, and others are probably on a short timeframe, and Senator Sarbanes. So I will recognize Senator Hatch for an opening comment, and then Senator Sarbanes and the others so they will be able to meet their schedules, and then I plan to be here with the nominee, but I want to congratulate her and welcome her to the committee.

Senator Hatch.

## OPENING STATEMENT OF SENATOR HATCH

Senator HATCH. Well, thank you, Mr. Chairman. We understand this has been a very busy day for all of us. The chairman has been in three or four committee meetings already, as have I.

We are happy to welcome you, Ms. Meissner, before the committee. We look forward to serving with you. We look forward to helping you in any way we can. I have a rather long opening statement, but I think I will forego that at this time, but would like to say that every nation has a right to control its borders and, of course, America is long overdue for a real crackdown on illegal immigration. When we talk about a crackdown, we mean a crackdown with effective measures.

It is no secret that I am very concerned about employer sanctions being discriminatory against persons of Hispanic and Latino background, as well as anybody who has a distinctly foreign name or

foreign appearance. I think that that particular subject needs to be revisited because I don't think we should have people discriminated against just because we are trying to control our borders when there are so many other alternative methods of doing so available for us.

I would like to work with you in trying to arrive at ways of helping to resolve these constant dilemmas, and I will do everything in my power to be of support to you. I have been very impressed with your service in the past, and also look forward to this service in the future. We will do everything we can to expedite this process so that we can get you in place and doing the things that need to be done. Just don't forget us when you get there.

Ms. MEISSNER. Thank you. I won't.

Senator HATCH. Thank you, Mr. Chairman.

[The prepared statement of Senator Hatch and questions and answers, subsequently submitted for the record, follow:]

#### PREPARED STATEMENT OF SENATOR ORRIN G. HATCH

Every nation has a right to control its borders. America is long overdue for a real crackdown on illegal immigration—a crackdown with effective measures.

We need to strengthen the Border Patrol by increasing the number of its agents in the field. We need to ensure that the Border Patrol has the equipment—radios, infrared devices, television monitors, sensors and the like—and the vehicles necessary to catch substantially more of the illegal aliens entering our country. We need to ensure that the Border Patrol has the funds to repair and maintain its equipment and vehicles.

We need to beef up the Border Patrol's anti-smuggling resources. And we need to determine how best to counter the growing use of our airports and sea coasts as means of illegal entry into our country.

We must also address abuses in the asylum system.

I also believe that one of the principal bases for a significant reduction in illegal immigration is economic growth in countries where the illegal aliens are coming from. In this connection, adoption of the North American Free Trade Agreement will be one of the most important measures Congress can adopt in ultimately cutting down on illegal immigration. I think NAFTA will be a boost to the economies of Mexico as well as to the United States.

In our effort to control illegal immigration, we should avoid reliance on big government regulatory programs like employer sanctions. I understand that this is a well-intended program. I respect very much the careful thought and reasoned arguments in support of it. In my view, however, employer sanctions burden American business, especially small business, cause some degree of discrimination, and have failed to work. Control of our illegal immigration must occur at our nation's borders, airports, and sea coasts. It simply will not be achieved in our nation's workplaces. Money spent on an unsuccessful policy is better spent hiring Border Patrol Agents, INS investigators who go after smugglers, and to buy and maintain equipment and vehicles needed to interdict illegal immigration.

At the same time that we seek to regain control over our borders from the illegal aliens pouring across them, I hope we do not target legal immigrants who comply with our nation's laws and seek lawful entry to our country. Ours is a nation of immigrants. On the Statue of Liberty in New York harbor is the famous line: "I lift my lamp beside the golden door."

In our effort to control our borders we should not slam the door shut against those who lawfully seek to come to America, like the ancestors of many of us here, immigrants who helped build America into the greatest country on earth.

The nominees before us has had extensive experience in immigration. I look forward to working on these issues with her.

#### MS. MEISSNER'S RESPONSES TO QUESTIONS FROM SENATOR HATCH

OCTOBER 6, 1993

*Question.* Some have suggested that strengthening the Immigration and Naturalization Service's Border Patrol is the most efficient means of controlling illegal immigration into this country. Could you assess the needs of the Border Patrol at

this time? For example, how many more agents does the Service need, what kind of equipment and vehicles are needed?

Answer. The Border Patrol is an essential element of an effective program to prevent illegal immigration. Clearly, the best enforcement strategy is one based on prevention. In his immigration announcement in July, the President authorized up to 600 additional positions for the Border Patrol. That is a very large infusion of new resources that will be of considerable help to INS in supporting the Border Patrol's ability and capacity to accomplish its mission. Moreover, INS would not be able to absorb more agents in the coming year because of the sizeable recruitment, training, and additional infrastructure demands required to bring on this many new people in a short period of time.

Beyond the 600, I cannot say at this time what the additional needs might be. The Border Patrol is making a serious, sophisticated effort to measure its effectiveness at the southern border so as to accurately project future resource requirements. And the Border Patrol's leadership understands the need to provide agents with the tools they need to be effective. Those tools include not only vehicles, but clerical and technical support. These support requirements are now routinely built into funding and expenditure plans.

Question. I understand that in recent years, aside from a lack of equipment and vehicles, the Border Patrol has had inadequate funds for maintenance and repair of equipment and vehicles. What is your understanding of this situation?

Answer. Although I am not yet intimately familiar with these operational details, it is my understanding that non-functioning vehicles and radios, for example, are issues of the past. There is a serious commitment and an effective program for keeping needed equipment in good repair. I can assure you that I will be attentive to this need.

Question. Undocumented aliens continue to pour across our borders. Some undocumented aliens are paying tens of thousands of dollars to smugglers in order to gain illegal entry to our country. We all watched the television reports of the Golden Venture, loaded with illegal aliens, run aground off the East Coast earlier this year. The major federal legislative response to illegal immigration has been employer sanctions, which have failed to control illegal immigration. As a candidate, President Clinton promised to reevaluate employer sanctions. Does the Clinton Administration still support employer sanctions in the face of massive evidence that sanctions have been unsuccessful?

Answer. To my knowledge, the Administration supports employer sanctions. Employer sanctions are predicated on the idea that workplace enforcement is a necessary aspect of a comprehensive response to illegal immigration. Prevention of entry at the borders is a highly desirable goal but it is not enough. More than half the illegal population within the U.S. did not come across the Mexican border. They came with visas, most of them properly obtained, and have stayed on. The best response that we know to that phenomenon is some form of workplace enforcement, such as employer sanctions.

Question. What is the average number of undocumented aliens a Border Patrol agent catches during one hour, in the field, watching the border?

Answer. The numbers vary dramatically, depending upon the place in the country where illegals are entering, the season, the time of day, the day of the week, weather, and changing economic and political conditions. Using San Diego, the busiest illegal entry point on the international border, as a barometer, Border Patrol agents apprehended 2498 illegal aliens over a 24-hour period during one of its heaviest work days in recent months. On average, agents apprehended, transported, and processed over 100 aliens per hour throughout the sector.

Question. How many people are being employed for, and how much money is being spent on, enforcement of employer sanctions?

Answer. In fiscal year 1993, INS spent about \$39 million and devoted 415 FTEs to employer sanctions enforcement.

Question. Instead of paying a federal bureaucrat to snoop around our nation's small businesses and trying to catch them in some violation, wouldn't a trained Border Patrol agent working on the border, actually catching undocumented aliens, be a better use of our resources?

The Clinton Administration should be out in front seeking repeal of sanctions so we can put the resources spent on enforcing them into something that works better. We are unlikely to repeal sanctions unless the President leads the effort.

Answer. As stated above, Border Patrol activity is crucial and prevention of entry is the most effective, desirable strategy. However, much of the illegal population did not enter by illegally crossing our land borders. Moreover, those who do and are successful in evading border officials, come here in search of jobs. There must be some



enforcement disincentive at the workplace, to supplement border enforcement, as long as jobs are a magnet for illegal immigration.

*Question.* a. Some believe that a universal, fraud-proof identification card can be developed which would then be required as a prerequisite for employment. Do you believe this is feasible and, how much would it cost?

b. If John Doe shows up at the office dispensing a so-called fraud-proof identification card, how would he prove he is really John Doe? Wouldn't Joe Doe have to present some documentation to this office to show he is, in fact, John Doe?

*Answer.* I do not know whether the card system you suggest is feasible, nor what the costs might be. But I believe the questions you raise must be seriously analyzed and debated. As to verifying the bearer of the card, the card would presumably have to include a photo to check against misuse. And the card would ultimately be only as good, from a fraud-vulnerability standpoint, as the documents or information systems that would be relied upon to generate it. All these considerations would have to be examined. But it is time, in my opinion, to undertake a thoughtful look at what technology offers to policymakers in this realm.

Senator KENNEDY. Senator Thurmond.

### OPENING STATEMENT OF SENATOR THURMOND

Senator THURMOND. Mr. Chairman, the hearing this afternoon is on the nomination of Ms. Doris Meissner for the important position of Commissioner of the Immigration and Naturalization Service. In addition to the nominee this afternoon, we also welcome Senator Sarbanes from Ms. Meissner's home State of Maryland.

Ms. Meissner has a commendable background and record in immigration issues which span two decades. Ms. Meissner has substantial experience within the Immigration and Naturalization Service, serving as Executive Associate Commissioner as well as Acting Commissioner for a time. In addition, I think it is helpful that Ms. Meissner recently has had an opportunity to gain a different and broader perspective on immigration issues at the Carnegie Endowment.

I wish to take just a moment to emphasize the importance of the issues that must be addressed by the INS Commissioner. Opposition to immigration among the American public appears to be rapidly growing. Every week from all over the country, I get many letters strongly opposing the current problems with immigration. This opposition is reaching alarming proportions.

For example, I recently received a letter from a lady, who incidentally was not from my home State of South Carolina, who wrote six pages by hand expressing her grave concerns with the immigration situation. The letter is quite reasonable in tone and is not unusual until near the end when she urged that illegal aliens be "deported, imprisoned or shot." Ms. Meissner, there is a sense of urgency to act so that the American people will have confidence in our ability to address the tremendous problem of illegal immigration.

Finally, I take this opportunity to commend Ms. Meissner for her willingness to enter into public service in this difficult position. I intend to support Ms. Meissner's nomination.

Thank you, Mr. Chairman.

Senator KENNEDY. Thank you very much.

Senator Sarbanes, we are glad to have you here and we look forward to your comments.

Senator HATCH. Welcome to the committee.

**STATEMENT OF HON. PAUL SARBANES, A U.S. SENATOR FROM  
THE STATE OF MARYLAND**

Senator SARBANES. Thank you very much, Mr. Chairman and members of the committee. I will be very brief. I know the pressures on your time.

I am delighted to have this opportunity to introduce and support Doris Meissner, who has been nominated by the President to be the Commissioner of the Immigration and Naturalization Service.

I must say, Mr. Chairman, if we could all figure out how to get a story like this in the paper on the morning of our hearings, we would really be in business. It is a very flattering profile that appeared this morning, and I commend that article to you if you have not yet seen it.

Doris Meissner is a very respected professional with broad knowledge and with practical experience in the immigration field. She is a highly regarded expert on immigration policy who understands the complexities and difficulties facing the INS. I believe she will bring the leadership and managerial expertise that are critically required at INS as it faces new challenges and the tough task of effectively carrying out our immigration laws.

A native of Milwaukee, WI, Doris Meissner has been a Maryland resident for the past 2 decades. She holds bachelor's and master's degrees from the University of Wisconsin. She first joined the Government as a White House Fellow assigned to the Department of Justice in 1973. For over 10 years, she held progressively more responsible positions in the Justice Department, including serving as the Executive Director of the Cabinet Committee on Illegal Aliens in 1976.

In 1981, she was Acting Commissioner of the INS, and served for 3 years as Executive Associate Commissioner from 1982 to 1985. Since 1986, she has been Senior Associate Director of the Immigration Policy Project of the Carnegie Endowment for International Peace. She has spoken and written extensively about major immigration issues and is widely recognized as an expert on major immigration and asylum policies.

As the son of immigrant parents, I am myself well aware of the opportunities this country provides, as is Doris Meissner, who is the daughter of immigrant parents. I agree with President Clinton's statement that the contributions of immigrants have greatly enriched and strengthened this country.

Last summer when the President announced new policies to deal with the serious problem of illegal immigration, he made the point that he favored a balanced approach that continues to welcome legal immigrants and legitimate refugees, while turning away those who do not obey our laws. He also recognized in that statement that a professional and well-managed Immigration and Naturalization Service is critical to effective implementation of immigration policy, and pledged his support to Doris Meissner and the Attorney General.

I want to congratulate Doris Meissner and commend the administration for making this excellent nomination. I urge the committee to approve this outstanding selection and I wish her well in this very important challenge ahead of her.

Thank you very much, Mr. Chairman.



Senator KENNEDY. Thank you very much. We would be glad to have you stay, Senator Sarbanes. We know you have other duties.

Just very briefly, I too want to both congratulate the President and congratulate the nominee. This is really a culmination of a lifetime of involvement on immigration and refugee issues. For far too long, the INS and refugee policy have been a stepchild of the Justice Department and national administrations, and I think General Reno indicated that would not be the case during this administration. One of her first activities as Attorney General was to visit the INS, which was an unusual indication of support for the personnel that were there, and also an indication that this administration was going to take immigration and refugee policy seriously and give it the kind of priority that it deserves.

The announcement of Doris Meissner's nomination in the Rose Garden by the President is a further indication of his strong commitment to deal with enormously complex issues that involve the basic roots of this country in terms of its establishment, and also deal with the kinds of emotional and flash-point issues in terms of illegal immigration and the range of different asylum issues that are of great concern to the American people.

To have someone of this background and experience to help guide public policy in these areas will be of great service to the cause of justice and fairness and to the best of our traditions, and also will be enormously helpful to us in the Congress. So we welcome your presence here today.

#### **TESTIMONY OF DORIS M. MEISSNER, TO BE COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE**

Ms. MEISSNER. Mr. Chairman, members of the committee, it is an honor and a privilege to have been nominated by Attorney General Reno and President Clinton and to appear before you today.

Let me begin by thanking each of the members of the committee for the time that you have devoted to meeting with me in preparation for this hearing. My thanks also go to Senator Sarbanes for being here to present me.

I would also like to introduce and thank my family. Behind me is my husband, Charles, and our children, Christine and Andrew. The pride of this occasion is equally theirs to share, for they have been my ballast at every turn.

Finally, I wish to thank the many employees of the Immigration and Naturalization Service and other organizations with which INS works who have so generously sent their good wishes and pledges of support. As I embark upon this vital and difficult assignment, receiving their votes of confidence has been particularly gratifying and uplifting.

For me, today's hearing marks the start of a new chapter in a continuing conversation with this committee that began almost 15 years ago. That conversation has spanned my work in various posts as a Government official and as an independent scholar analyzing and writing about immigration matters. As I return to Government service, I would like to take this occasion to briefly outline three broad goals that I believe must characterize INS' work.

The first goal is professionalism. We live in a time where immigration is integrally related to many critical aspects of our national



and international life. To meet the demands posed by these new realities, INS must uphold the highest standards of integrity and professional conduct. In turn, immigration officials must be empowered to deliver a quality product by having clear policy objectives, proper training, and modern technology and work methods.

Second, the goal of control with compassion must guide our thinking and actions. The guardian of our immigration heritage, INS enforces the law's requirements to say no so that we can as a nation continue to say yes to immigrants. The exercise of such extraordinary power must always be done with care, compassion, and respect for human and civil rights. Moreover, fair and timely decisions regarding benefits for which applicants are eligible are as important as the activities of uniformed and investigative personnel in a law enforcement regime whose mission is to effectively manage and regulate immigration flows.

Immigration policy leadership is the third goal I believe we must pursue. The movement of people is emerging as one of the critical global issues that we face in a new age. INS must be a source of innovation, accurate information, and imaginative partnerships with many other Government and private actors if we are to master the challenges that these movements pose.

With these goals as the starting point, I am confident that INS' ability to do its work effectively can be substantially strengthened, and an INS that does its job well can play a central role in alleviating the tensions that inevitably surround immigration processes. To those ends, working closely with the Attorney General and the President, I look forward to a productive working relationship with the committee and the Congress.

Thank you very much.

[The prepared statement of Ms. Meissner follows:]

#### PREPARED STATEMENT OF DORIS M. MEISSNER

Mr. Chairman and Members of the Committee, it is an honor and a privilege to have been nominated by Attorney General Reno and President Clinton and to appear before you today. Let me begin by thanking each of the members of the Committee for the time you have devoted to meeting with me in preparation for this hearing. My thanks go also to Senator Sarbanes for being here to present me, and to Senator Mikulski for her message to the Committee in my behalf.

I would like also to introduce and thank my family—my husband, Charles, and our children, Christine and Andrew. The pride of this occasion is equally theirs to share, for they have been my ballast at every turn. And finally, I wish to thank the many employees of the Immigration and Naturalization Service (INS) and other organizations with which INS works, who have so generously sent their good wishes and pledges of support. As I embark upon this vital and difficult assignment, receiving their votes of confidence has been particularly gratifying and uplifting.

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cise of such extraordinary power must always be done with care, compassion and respect for human and civil rights. Moreover, fair, timely decisions regarding benefits for which applicants are eligible are as important as the activities of uniformed and investigative personnel in a law enforcement regime whose mission is to effectively manage and regulate immigration flows.

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Thank you.

Senator KENNEDY. Thank you very much, and we welcome your family here for this occasion.

I am sure you are familiar with the various reports that have been very critical of INS management, the GAO report, the internal Justice Department review 2 years ago, the Carlson report more recently, and the House Government Operations Subcommittee, which concluded INS is not a well-run agency. Administration of Federal immigration policy has suffered from inadequate leadership, insufficient funding for key positions, debilitating inefficiencies at the INS, and a failure on the part of the members of the executive and legislative branches to appreciate fully the magnitude and impact of recent immigration into the United States.

I am just wondering if you have read all of these reports and what conclusions you have drawn on the basis of those reports. Could you give us some idea about how you are going to deal with at least the parts of the reports that you think have some legitimacy.

Ms. MEISSNER. Well, the reports that you cite do raise some very serious questions which I take as my very first responsibility when I arrive in this position. My own plan is to begin with three very important first steps.

First, the organization and structure of the Immigration Service needs to be reviewed. The organizational pattern that is presently in place is one that is based on a concept of centralization of authority. I need to review that organizational structure. I need to make some very clear decisions about how the Agency is going to function, and I will say that my bias is in favor of a structure where the authority is more decentralized, with the decisionmaking taking place where the action is, but according to very clear and strong national guidelines and nationally established goals and objectives.

I think that it is very important to be quite quick in making decisions about structure. Bureaucracy is unsettled by nothing more than it is unsettled by uncertainty about the structure that it works in, so this will get my first order of attention and I think we can resolve some of the open issues within the first few months.

The next thing that is extremely important is a very hard look at the mission of the organization and what that mission is in light of the circumstances that we find ourselves in today. I think it is fair to say that there has been no thoroughgoing, comprehensive



review of INS' mission for possibly as much as a decade, and during that period at least three major pieces of legislation have been enacted that give important new responsibilities to INS, and a number of other things have happened that affect the priorities that the Agency should have.

My experience and my thinking is in favor of an organization that is run by a strong management-by-objectives program. Chris Sale, the Acting Commissioner, has taken important leadership this past summer in beginning to pull together some planning and strategic thinking activities in the Service. I intend to pick up on the initiatives that she began in that regard, and we will establish a clear set of priorities which will be the means by which the Agency is managed and it will set the basis for allocating resources and determining operational priorities.

The third thing that needs to be done right at the outset, of course, is personnel. When all is said and done, it is good people that make good organizations. I will be very much looking for people who are experienced, who have some seasoning in this field, and there are a considerable number of key field posts that are vacant at the present time in the Service. I intend to move quickly in filling those posts and hope that those choices will set a tone for the overall atmosphere that we hope to promote at INS.

So those are the first things. Those are the things that I will start out with, and I think I will leave the answer at that point for right now.

Senator KENNEDY. Those are certainly worthy. One position that I hope they are going to fill is on the commission that was set up on the immigration bill. They are meeting today. They have got an acting commissioner. Harry Fuchs is a very outstanding individual. Cardinal Law was the chairperson of that. It is being funded. It is one of Congress' attempts to have a continuing kind of review of the impact of the past immigration law so we get a heads-up on different provisions of it, whether it was on the issue of the whole range of babysitters and the issues which were stirring across the country earlier in the year.

They are dealing with a wide range of different questions and it is important, I think, to have not only the field offices, but I would hope you would give attention as well to that commission and see how we can work. It has in its makeup some strong support in the Congress, and I think by the administration, and that can be extremely helpful as well.

One of the areas I would like you to talk about a little bit is about the employer sanctions issue, and also the general criticism that more is being done with regard to paperwork problems than really dealing with some of those that have been particularly abusive in terms of discrimination.

We have a very diverse view on this committee with regard to that particular public policy question, but we are going to let you get a chance to weave your way through that mine field for a few moments and give us your own insight as to what you think is really happening out there.

We want to welcome Senator Simpson. I thought when we mentioned employer sanctions, we would get you down off your perch.

Senator SIMPSON. I nearly levitated. [Laughter.]



Ms. MEISSNER. Well, not being at INS yet, I have not had a chance to—

Senator KENNEDY. Would you just hold? As I understand from staff, we are going to vote at 3. I have used 4 minutes. We will divide the time before 3 and then those who are able to come back will come back. But if it is agreeable, we will just divide the time between now and then. I will instruct staff to do that.

I also want to apologize. Senator Simon is the other member of the immigration subcommittee who is on the floor now on an amendment that affects his State, and I want to apologize.

Ms. MEISSNER. As I said, not being at INS, I have not had a chance to review the specific activities that are underway where employer sanctions are concerned. But as a matter of policy, I do believe that we need workplace enforcement as part of a comprehensive program to address and discourage illegal immigration. The reason, of course, is a very straightforward reason, which is that jobs are one of the inducements, a strong inducement, that brings people to the country illegally.

Now, that being said, I think it is fair to say that the experience with employer sanctions in practice has not been what it might be, and I think the evidence is quite clear that it is not operating as a labor standard. In other words, it has not seemed to increase wages or curtail illegal immigration dramatically.

The Federal effort that is going into enforcing employer sanctions is considerably less, probably half of what it was when the legislation was enacted, and there are continuing and chronic complaints of serious discrimination as a result of employer sanctions. Now, we know that the research does not make a direct link between the discrimination and the law itself, but I think we have to operate on the assumption that it does contribute to an atmosphere that promotes discrimination.

So I believe that the employer sanctions issue needs to be thoroughly revisited and we need to really turn our attention to the question of what kind of workplace enforcement can be effective. There is a good deal that the executive branch can do. I think there is a good deal more that it can do than has been done, and where the kind of enforcement is concerned, whether you do paperwork violations, pattern or practice, go after egregious employers, I think it is quite clear that with limited resources you need to go after the egregious employers, and those employers are generally employers that violate not only employer sanctions requirements, but also violate other labor laws. So it is terribly important to target that kind of behavior.

But ultimately the major weakness of sanctions, of course, has to do with the employer verification requirements and the way that the law is structured, and I think the Congress understood that. I think we all understood that in 1986 when the law passed. It was clear that it was a first step at trying to deal with the job situation where illegal employment was concerned, but I would say it is time now to take the next step, and the next step is to look very carefully at what it is that we are asking employers to do and what it is that we have available to us in order to discourage the use of fraudulent documents and to create a system where verification

can be done without bringing about discrimination against people who are looking for work.

So I would hope that we can work together on this matter because I think it is a very important one and I think it is ripe for reexamination.

Senator KENNEDY. I am just going to have one final question, and that dealt with the asylum issue. I think we will probably come back to the employer sanctions later on. But on the asylum issue, the administration's proposal, your own position on the administration's proposal and reaction to it?

Ms. MEISSNER. Well, obviously the area of reform of political asylum is a very high priority for the administration. As you know, some legislation has been sent to the Congress for one aspect of the asylum problem, expedited exclusion legislation, and the administration determined that it would make an announcement on a broader reform proposal by the end of September. Today is the end of September and that proposal is ready. I am not at liberty to lay it out in detail at this moment, but I think within the next week or two we will be asking to brief you on it.

I am quite convinced that it is an excellent set of reforms that have been developed. It is a proposal that is based on the notion that, first and foremost, we must have a political asylum system that delivers refugee protection and that delivers it in a timely and fair fashion.

Second, by delivering refugee protection—that is, by making the decision quickly on who is a bona fide refugee, you also make the decision on who is not, and that begins to counteract the abuse that exists in the system. The abuse that exists in the system is largely a result of the Government not responding, not deciding cases, so that they sit for long periods of time and during that time people receive work authorization, and that fact invites applications that are not well-founded.

So I can assure you that an enormous amount of time and effort and expertise has been put into this question, and we will be looking forward to presenting our recommendations in the very near future.

Senator KENNEDY. We will look forward to it, and there is enormous interest in it and we will be available at the earliest possible time.

Senator Hatch.

Senator HATCH. Thank you, Mr. Chairman. Some have suggested that the strengthening of Immigration and Naturalization's Border Patrol is the most efficient means of controlling illegal immigration into our country. Could you assess the needs of the Border Patrol, really, at this time? For example, how many more agents do we need? What kind of equipment, what kind of vehicles are needed? What can we do to help you there?

Ms. MEISSNER. Well, I agree with you that the Border Patrol is an enormously important aspect of the Immigration Service's work. The Border Patrol, after all, is the program that gives us prevention of entry in the first place, and clearly the best enforcement strategy is a strategy that is based on prevention.

I cannot give you at this time an assessment of what a perfect resource situation would be where the Border Patrol is concerned,

but I can say that among the proposals and decisions that were announced in July by the President was the addition of 600 officers to the Border Patrol. That is a very, very large increment and, frankly, probably about as much as the organization can swallow in 1 year.

There has been a lot of very careful planning underway on how best to bring those people in, what the proper increments of equipment ought to be, and I think that there is a very sort of a mature understanding within the Service these days that it does not do any good to put a new person on the line unless you give him the tools that are required for him to do his work well, so that the issues that we used to have with vehicles that didn't work, radios that were not properly equipped—I trust that those issues are issues of the past.

Senator HATCH. I understand that in recent years, aside from the lack of equipment and vehicles, the Border Patrol has not had sufficient funds to even maintain or repair its current equipment and vehicles. Is that your understanding as well?

Ms. MEISSNER. Well, no, although, as I say, I am not familiar in detail, but I think that the equipment is actually——

Senator HATCH. Pretty well maintained?

Ms. MEISSNER. I mean, there is a real commitment to keeping it maintained.

Senator HATCH. You might want to check on that because I have heard otherwise, but I hope you are right on that.

Ms. MEISSNER. Well, I would be happy to get some detailed information to you.

Senator HATCH. I am sure you will, and I would like to give whatever help you need.

Recently, Vice President Gore released his report on reinventing Government, and the report recommended that the Immigration and Naturalization Service's organization and management be improved at a savings of approximately \$48 million. Now, is it possible that a portion of this \$48 million could be redirected to the Border Patrol? He wants to save the money, but it seems to me that there is inadequate money there now.

Ms. MEISSNER. Well, obviously, we have to operate within the framework of the overall fiscal discipline that the executive branch is trying to achieve. I can't answer the question right now about whether that money could be made available to the Border Patrol. I obviously do everything that I can to be sure that the resources that the Agency receives are appropriate to its needs, and certainly wherever we can make internal savings we will put them out into the field into operations where they are needed.

Senator HATCH. Could you give us some idea of the average number of undocumented aliens a Border Patrol agent catches during 1 hour in the field or during a day in the field watching the border? Are there any statistics you are familiar with in that are?

Ms. MEISSNER. There certainly are statistics on the number of apprehensions that we make, but an apprehension could be the same person every day for several days. We don't know how many people actually come across the border, and the numbers that any Border Patrol person apprehends in any hour varies enormously by where they are on the border, what time of day it is, what season



of the year, whether it is the weekend or during the week. There certainly are average numbers. I don't have them with me today and we can get them to you, but, as I say, they are numbers of apprehensions, not numbers of individuals.

Senator HATCH. Well, I have a lot of other questions, but I think both Senator Thurmond and Senator Simpson, who really is our ranking member on this side, are here so I will forego those. I am convinced you will do a terrific job and I intend to help you every step of the way.

Ms. MEISSNER. Thank you very much.

Senator HATCH. We do handle an awful lot of immigration problems in our offices here and in Utah, and I just want to personally thank the INS for being of great assistance to us through the years because there are no axes to grind. We just want to do a good job and make life as reasonable and decent for human beings as we possibly can, and I know you will continue that cooperative approach. There is not much thanks for doing it, but it is very, very important. Thank you very much. We are happy to have your family here as well.

Ms. MEISSNER. Thank you very much.

Senator KENNEDY. Senator Thurmond.

Senator THURMOND. Ms. Meissner, it appears that reducing the level of illegal immigration may be necessary in order to maintain public support for appropriate levels of legal immigration. What concrete steps do you propose to take to address the serious problem of illegal immigration?

Ms. MEISSNER. Well, I think the matters that we have been talking about here today are examples of those concrete steps.

Senator THURMOND. If you don't mind, speak into the microphone so we can hear you.

Ms. MEISSNER. Can you hear me now?

Senator THURMOND. Please pull the microphone up to you.

Ms. MEISSNER. I think the things that we have been speaking about earlier in the hearing represent concrete steps. We obviously need an effective Border Patrol so that we can prevent entry wherever possible. We also need to be sure that our interior enforcement is operating effectively. We have to have a balanced program of detention space, of adequate judges for deportation hearings. We need to emphasize removal so that the message goes back that once you arrive, it is not simply a chance to stay. So I will be working on all of those kinds of programs, as well as trying to tighten up the management of the Service so that it can deliver its product appropriately.

Senator THURMOND. Ms. Meissner, many people now suggest that our armed services be used in the effort to reduce illegal immigration, but in the past such activity has been considered inconsistent with the mission of the armed services. Do you think that there are circumstances in which the armed services should be called on or may in the future be needed to stop illegal immigration into the United States?

Ms. MEISSNER. Well, the Defense Department and the National Guard do provide important support at the present time to the operations of the Immigration Service. They are very helpful with equipment and technology. They are helpful where radios and com-

munications are concerned. We get help on training missions, in building facilities, clearing brush and activities like that.

I think that, at least at this point, I would say that it is appropriate to leave the role of the military services as a support role, and I certainly would hope that we don't see the day where it is necessary to press them into direct service.

Senator THURMOND. Ms. Meissner, I do not believe that we should view immigration simply as an economic matter, but certainly that is a relevant issue. There appear to be conflicting studies and analyses about whether immigrants are a net financial drain or provide net economic benefits after they arrive in this country.

What is your understanding or viewpoint on whether immigrants are an economic benefit or detriment to our country, and the size of the impact, if you have had a chance to go into this?

Ms. MEISSNER. Well, that is a very difficult set of questions. I think most of the evidence points to the fact that, overall, at a macro level immigration is a net plus for the country. At the same time, when you are in periods of high immigration, as we are at the present time, that immigration is not evenly distributed around the country. It impacts a few areas. At the present time, immigration is basically a phenomenon in just six of our States, and where it is occurring and in the communities and neighborhoods and cities where there are very large numbers of immigrants, it does create difficulties and it does create issues which need to be addressed.

Senator THURMOND. As I emphasized in my opening statement, Ms. Meissner, the public seems to be increasingly concerned with the problems of immigration. To what extent do you think the INS Commissioner should be responsive to public concerns?

Ms. MEISSNER. Well, I think any public official has to be responsive to public concerns as much as possible. Clearly, we have to be aware of public attitudes. At the same time, I think all of us in elected or appointive office have an important leadership role to play in explaining to the public what it is that is going on. So I hope to be responsive, but I also hope to be able to try to lay out and gain a greater understanding for some of the reasons that are behind this phenomenon.

Senator THURMOND. With your fine record, I presume you would not hesitate to take whatever steps are necessary to control the situation and protect the American people.

Ms. MEISSNER. Thank you.

Senator THURMOND. Thank you very much. Thank you, Mr. Chairman.

Senator KENNEDY. Thank you.

Senator Simpson.

#### OPENING STATEMENT OF SENATOR SIMPSON

Senator SIMPSON. Mr. Chairman, I am very sorry to be late, but when I walked in and saw you and Senator Hatch sitting there talking about employer sanctions, I knew the forces of darkness had joined again. [Laughter.]

Senator KENNEDY. You are going to have to get used to this, Ms. Meissner.

Ms. MEISSNER. I have never seen it before. [Laughter.]

Senator SIMPSON. You have been watching this for 15 years.

And then to see Senator Thurmond and I bathed in the gentle glow of truth and light—I think that is important. [Laughter.]

Senator KENNEDY. I think he has got a little Irish blood in him.

Senator SIMPSON. Well, Mr. Chairman, you and I know this person. I welcome you to this committee, and to Charles, whom I have met, and I think I have met your children before, Christine and Andrew.

I don't think there has been a time in my nearly 15 years in the Senate when the public and the Congress and the administration and all the key players, and I mean all of them, have been more unified in calling for some type of sensible, reasonable immigration reform. This presents both an opportunity and a great caution, maybe even a danger.

No one knows better than you and those of us at this table, Ted and myself, how difficult it is to pass immigration control legislation. But now there is this widespread belief out there that something has to be done. It is almost a demand now that something has to be done. This presents an opportunity to enact some sensible legislation, as I say, but I think I see the usual anti-immigration and, yes, anti-immigrant sentiments running high in the country.

Officeholders like all of us who usually view immigration as a dangerous political minefield are now just wandering right into it. We are now looking at the issue with not only new interest, but great relish, and that could lead to some ill-advised and even irresponsible immigration legislation. I think we should take advantage of the opportunity, and I think we should do that carefully. We must use the opportunity to process legislation to control illegal immigration without damaging our historical hospitality to immigrants who enter legally.

Mr. Chairman, I know of no better person—and you and I know Doris Meissner—I know of no better person to be the Commissioner of the Immigration and Naturalization Service at this critical time, bar none. No Commissioner has been better prepared for this job than the nominee, and I can't possibly be objective and I know you aren't either. We know the work, we know the person, we know the work product.

You have served both Democratic and Republican administrations in the Justice Department for 8 years, serving as Acting Commissioner and Executive Associate Commissioner in the Immigration Service for 5 years. You have by now studied, researched, surveyed, framed, munched on, and commented upon almost every single aspect of immigration—asylum issues, refugee issues, verification processes, employer sanctions—with your work as director of the immigration project at the Carnegie Endowment for International Peace. So you have a headstart over everyone else.

I am very pleased to see the President taking such a personal interest. I have had some wonderful visits with Janet Reno. She knows this issue. She comes from a State heavily impacted by refugees and immigration, legal and illegal.

You will know—at least I think you will know—what is real, what is fake, what is emotion and what are the usual things that drive this issue: emotion, fear, guilt, and racism. You have heard



me say it a thousand times, and sometimes sitting right there. You know the players, you know where the bones are buried, and I hope that you remember where the groups lurk.

I hope we can keep this administration out of the grip of the groups, and I think that they are finally paying attention and they know that they must become solid, reasonable players. The old stuff is no good anymore. The extremists on both sides of this issue hopefully will get burned.

I am ready to plow that middle ground, and you and I won't always agree, but I think this is a case where the President and the Attorney General have chosen the very best person for the job. I resoundingly applaud your nomination and look forward to working with you, and I know our country will be well served by this and I congratulate you.

Ms. MEISSNER. Thank you.

Senator SIMPSON. Do I have a minute for one question?

Senator KENNEDY. Sure.

Senator SIMPSON. It is very difficult to deal with him sometimes, but I am going to go ahead with a question.

You have been in this longer than I have. This was not an issue I sought. Senator Kennedy has been in it for his entire term here, and Jerry Tinker and Dick Day, and you know the players. It has been a great pleasure to work with them.

Senator Kennedy has asked you some questions on what we should do; how do we reassure the American public; how do we gain control over illegal immigration; who enters. You have had the question on employer sanctions and I understand your position, but what is the role of the Labor Department there? Does the Labor Department have a role in enforcing employer sanctions? Is it even possible to enforce employer sanctions without a more secure verification system?

And then, even though it is a multiquestion, how important are structures at the border? Is there a place in immigration enforcement for the military or the National Guard? I resisted that always in the past. That is a broad, multipart question, but you have been at it for a long time and I would appreciate your sharing your views. Governor Wilson of California has requested me to put a question—I would have put it myself, and he certainly impelled me along—as to this strip down in El Paso, this 20 miles of highly urbanized border at El Paso. The Immigration Service has tripled the ordinary deployment and maintaining that strength for 24 hours a day in that “hot spot” where massive illegal immigration occurs in a very concentrated sector.

Would it be cost-effective to maintain for a time, a 3-week test, that kind of deployment in other hot spots, or is that an intrusive or difficult or volatile type of activity? Could you share with me your thoughts on that?

Ms. MEISSNER. OK, let me take them in order. Where the Department of Labor is concerned, of course there is a role for the Department of Labor. The Department of Labor has the authority and the responsibility to enforce minimum wage laws, child labor laws, OSHA, and so forth. I think I said earlier, if you were here—pardon me for repeating—generally, violations of labor laws like employer sanctions come in a bunch.

Generally employers that are prepared to break the law break a number of laws, so that close coordination and close working relationships between the Immigration Service and the Labor Department are terribly important at the Federal level as well as at the State level. States have an important role and responsibility where labor standards are concerned.

Those are things that I will be very interested in looking at and I will try as much as possible to promote very close cooperation in that area, but I do believe that when all is said and done, there is an essential flaw in the legislation and in the system that we use where sanctions are concerned, and that is, as you know, the flaw that has to do with employers verifying and their ability to look at a document and quickly and easily comply with the law without discriminating against the applicant.

So if we are to be serious about workplace enforcement and if we believe that eligibility to work is a labor standard that needs to exist in this country in the kind of world that we live in, then I think we ultimately have to face that question of documents and of employer verification procedures.

Structures at the border—there are structures at the border. We have fences. There are a number of places in which there are physical barriers, impediments. How much or how little, I must say I am not prepared to comment at this point. I think there is a place for it. At the same time, there are some important symbolic issues that are attached to putting up physical barriers. I think we need to be very cautious.

The military—as I said when Senator Thurmond asked about the military—the military, both through the Defense Department and through the National Guard, is involved today in border enforcement. Their involvement really dates from legislation in the late 1970's, and the Border Patrol people feel very comfortable with the role that the military is playing now. They give a lot of technological support. They do a lot of things that allow our people to be on the line performing their primary functions. I think we would prefer to keep the role of the military in a support position, and I certainly hope that we don't face circumstances where anything more will be required.

You talked about the El Paso experiment and the two crossing points, San Ysidro and El Paso, that account for most of the illegal entry. This experiment that has been going on in El Paso, I think, is fascinating. There has been essentially a blockade and border crossing has really been cut down very dramatically, and what do we find? We find that the arrests, the apprehensions, have declined because it is clear that people are not going to be able to cross and so they are not trying.

At the same time, we find that about 85 to 90 percent of the revenues of the commercial sector businesses in El Paso have disappeared. So it really demonstrates how interconnected and sort of organically linked we are at the border, Mexico and the United States. A total enforcement regime runs up against the very important competing objectives of business and commercial activity that goes on at the border.

We obviously have to find the right balance. It can't be either/or. In the California situation, with the new resources that the ad-



ministration is devoting to the border, the intention is to do some very, very heavy staffing on that border to begin to really determine what kind of a balance is effective to discourage in a serious way the crossing without absolutely cutting off any kind of opportunity for people legitimately to cross who need to. That is something that I think we have to work at and it is a very important balance to try to find.

Senator SIMPSON. I think you are right. It is a remarkable thing happening there with the blockade, and yet 90 percent of those surveyed endorsed it, which is another part of what I was saying before. Even though 85 percent of the business community said they would soon be out of business in certain areas, 90 percent of the people are endorsing the proposal, and the figures are rather dramatic as to the decline in crime and all the rest of the activity. That is not an ugly statement; that is just real.

Illegal aliens, of course, are apprehended and many agree to go back voluntarily. People don't understand that. Then we bus them across the border. In the past, very, very few of those people have ever claimed asylum. I mean, how could they because they would have to say they were fleeing persecution based on race, religion, national origin, or political opinion from a democratic country to our south? I mean, I am always stunned when people say "asylees." There are no asylees from Mexico. They may be asylees from some other country coming through, but they are not from Mexico because Mexico is not that kind of country.

Last year, we had 614 Mexicans claiming political asylum, which is surprising in itself that anyone could be able to pull that one. However, during the last 7 months we have had 5,423 Mexicans claiming asylum, an increase of 900 percent. Applications are now coming in at 1,000 a month. I suppose it was only a matter of time before the Mexican migrants and their attorneys and the groups figured out how they could delay their departure from the U.S. and get work authority, as Central Americans have been doing for years. Now that that is pretty well cleaned up down there, but we will have to ask about concluding the extension of their temporary status. I am sure we won't get very far with that one.

It is clear to me that our entire asylum process has been gimmicked by frivolous claims by illegal aliens. True asylees are the real victims of this broken system, I think you would agree, and the American public. Based upon your years at the INS and as a scholar, describe what specific reform measures you might take as Commissioner to reduce the abuse of the current asylum system, which is what has given rise, ironically, to the switch into correcting something about immigration, although they are totally different. So could you please give us your comments?

Ms. MEISSNER. Well, the asylum system is broken and we do need to fix it, and we have a set of proposals on how to fix it that I think are very, very ambitious and will be effective. They are based on the notion that you have to make a timely decision and you have to interview all of the cases and you have to most quickly decide who the true refugees are, and then you need to go on, deny the others, and finish the process in a timely fashion so that the delays don't in and of themselves invite applications that create further delays. That is the dynamic that is presently in place. That



is what is giving rise to the abusive claims and that needs to be corrected.

The proposals are basically ready. We will be coming up in the next week or two to brief the committee on what it is that we have in mind, but I think you will be very pleased.

Senator SIMPSON. Well, we are waiting for that and I think that with some negotiation I think I can join the administration on an asylum bill. We are not very far apart. We have a roll call vote, but I do say again that I am very pleased. As I watched your nomination process proceed, I wondered how best I could help, so I just kept my mouth shut, which was magnificent. [Laughter.]

I thought that was really something in itself that I had done that. So I am very pleased. I have never seen the stars aligned in this fashion where we have the President, the Attorney General, the INS, all committed. That has not been the case in a rather lonely bit of travel.

So I thank you and wish you the very best. I will have some remaining questions I will submit for the record about perhaps how Mexico could assist us and issues of Senator Feinstein's proposal of the border fees, issues of Senator Boxer's proposal of the National Guard. She is not suggesting the Guard on the border—she is suggesting the Guard to be doing administrative work and office work while the Patrol is on the border. She was saying the National Guard serves to relieve and release the Border Patrol to do its job, and that is, I think, a very interesting point.

Well, I thank you. I think we will recess at this time until Senator Kennedy returns. Thank you.

Ms. MEISSNER. Thank you, Senator Simpson. I certainly appreciate your kind words and look forward to continuing this.

[Questions and answers, subsequently submitted for the record, follow:]

#### MS. MEISSNER'S RESPONSES TO QUESTIONS FROM SENATOR SIMPSON

OCTOBER 6, 1993

*Question.* What, if anything, can the INS do to assist good-faith employers who want to hire a legal work force without discriminating, and who have learned the hard way that they cannot depend on the documents presented by prospective employees?

*Answer.* INS would like to be in a position to devote considerably more effort to assisting employers to comply with the law. Unfortunately, the resources to do so are scarce. I believe that the best assistance we can give to employers is not individual assistance, desirable as that might be, but improvements in the documents that INS itself issues, vigorous document anti-fraud enforcement, and, ultimately, improvements in the employer sanctions law to strengthen the ability of employers to meet verification requirements in simple, straightforward ways.

*Question.* There have been significant advances in document-reader technology which may assist in resolving this problem. Will INS aggressively pursue the implementation of these technologies, and will the INS cooperate in the live testing of advanced document readers?

*Answer.* I have not been briefed on the particulars of document readers and testing them. From what I do know about the technology, I see no objection whatsoever to your suggestion. More broadly, I want to enthusiastically endorse all efforts to bring technological advances to bear in crafting solutions to immigration control problems.

*Question.* Assuming it were willing, what reasonable steps could the Mexican government take to assist us in controlling illegal immigration across our southern border? We know they do provide some help in apprehending third country nationals, but what could they do to discourage and disrupt the large illegal cross-border flows of Mexicans in San Ysidro, El Paso, and other high traffic areas along the U.S.-

Mexican border. What, if anything, would you do to encourage this kind of cooperation?

Answer. In another context, President Salinas has said Mexico want to send goods, not people, to the U.S. In that spirit, the Mexican government, in my experience, is increasingly willing to work closely and seriously with the U.S. on matters surrounding illegal immigration, even though cooperation raises sensitive domestic political issues for the government. Evidence of this is in the incidents this spring surrounding the arrival of boatloads of Chinese in Mexican Waters. Other kinds of assistance would be in the areas of combating alien smuggling (some cooperation has always occurred in this arena), reopening the potential for interior repatriation, and potential prisoner-return arrangements.

I have always had good relations with Mexican officials and believe strongly in bilateral and multilateral cooperation in addressing international migration issues. In fact, I have already met with Mexico's ambassador to the U.S. in this regard.

*Question.* At present, conditions in Mexico are such that few asylum claims would be meritorious, nor would there be merit to most claims from Canada, western European countries, many eastern European countries and other countries. Would you support the designation of "safe" countries whose nationals would not be allowed to pursue refugee or asylum claims in the U.S.?

Answer. I am very uncomfortable with the notion of "safe" countries as a basis for screening asylum claims. Even though few claims from certain countries might be meritorious, if they exist, we should be willing to hear and consider them. This assumes, of course, that such claims are honestly and truthfully presented and not a subterfuge for other purposes.

More importantly, the designation of "safe" to some migrant source nations and not to others will inevitably carry with it a foreign policy judgment that will become a political decision. We have finally ended the Cold War with its slavish depiction of some countries as refugee-producing nations because they had Communist governments, while overlooking extreme circumstances of abuse from others because they supported the West. I would not want to open up a similar form categorizing and I believe the "safe" country concept brings with it that potential.

[Recess.]

Senator KENNEDY. We will come back to order. Just a few areas that I would like to just draw to your attention, and maybe they will be included in your earlier responses in terms of the restructuring and reorganizing.

We have a regional office, or I guess the regional one technically is up in Burlington, VT, but the major one is in Boston. I would hope that you would ask one of your top officials just to check the way that individuals enter that whole process and system, from the phone systems, the varying messages, who you have to punch in if you want this, if you want that. I mean, unless you are a computer expert and have a pencil and a paper and speak English absolutely fluently, you will never understand or work your way through that process or system. I mean, it is just extraordinary.

I think we have to get in the modern age, and my office is on the cutting edge of using the computers and all the rest, and getting into Internet. We had to do that, but in terms of the entry level of the system, really have someone check—it is not only in Boston, but the other centers—because it just is not right and it makes an enormous difference in terms of people and how they view, obviously, government and how we view them. I mean, I think it is something which has been ongoing and continuing and has deteriorated.

Second, on the follow-on settlements, we have in Lowell, MA, the second highest number of Cambodians outside of Phnom Penh. Three temples are up there. There are enormous programs in terms of bilingual education where the local community has gone to extraordinary—and it is a hard-pressed community and you would see the percentage increase in their budget on education not



exceeded, I think, in any other community in Massachusetts, and it is hard-pressed. People want to try and help, people really do, but they needed the Khmer books, Khmer teachers. They sent people on down to the United Nations. They went to extraordinary efforts themselves in working with the State Department and others to try and develop some programs there.

There are very small amounts of resources there that can be used for follow-on. Other areas of the country may have this as well. I know we have it, and be sensitive to it because it has enormous impact in terms of these communities and also in terms of people's attitudes generally on issues of settlement. I would be glad to visit and talk with you later about it.

Let me ask you about individuals who are illegal who are apprehended here. Should we have them stay for their sentence and then deport them? Some people think that we should. They think we ought to get them out of the country, and then others say, well, if you do that, they will be right back in here. Have you thought about that at all? I don't know what your own views about that are.

As the Judiciary Committee, we are always interested in issues on sentencing and issues of incarceration and other kinds of questions, but I am just wondering if you had formed any thought about—

Ms. MEISSNER. You are talking about criminal aliens?

Senator KENNEDY. Yes.

Ms. MEISSNER. OK, and they are sentenced and they serve their sentence here. Well, one of the problems in the past had been that criminals served their sentence and then were obviously subject to deportation, but there was no coordination between the release and the deportation.

Senator KENNEDY. Absolutely.

Ms. MEISSNER. That linkage has been bridged and there is now a very aggressive program that INS pursues where deportation hearings are given in the prison. The immigration judge comes to the prison, and if the person is deportable that decision is made so that there is not a broken link.

But the further issue, of course, is the issue of whether aliens should serve their sentences in prison from the country that they came from when they are illegal, and that is a thorny question that has some real international relations dimensions to it, but it also has some serious cost characteristics here in the United States. I think it is something that is being looked at in the Justice Department and discussed with the State Department and it is an area that I think we should examine.

Senator KENNEDY. Good; I don't really have a view. I can make the case both ways and I just don't know, but people ask me about it and I think it would be useful to have someone like yourself with experience give us your reaction.

On the backlog on naturalization, I hope you are going to really take a look at that. That is large and I think it is getting larger, and how we do that in an appropriate kind of way I am sure will be included. I don't know if you want to make additional comments today or let me ask you the questions and have you submit some additional kinds of material for the record, but I would be inter-



ested if you could review how you are going to try and deal with some of those backlog issues on naturalization because that has a lot of people concerned.

One item that I would mention to you is when—not if, but when we get health insurance, we are going to each have little cards, as the President pointed out the other night, and you might take a look at this to see, if that is going to happen to all Americans, whether there is any crossover in terms of I.D. cards and where we are going to come out. I think all Americans are going to want a card that is going to do that in terms of their health. Does it have an application or not? Maybe at some time or other you can look at that and let us know whether there is some thinking in that area.

I would just mention we had our consultation with the Secretary of State, Warren Christopher, the other day about the number of refugees, and we were reminded that the Soviet Union still has not put in place an immigration law. I remember talking to Gorbachev when he was the General Secretary and he indicated he was going to put it in place, and Yeltsin had indicated it. I know that is not the first order of priority, obviously, now in these difficult days, but I think that that would have an impact and could have an impact in terms of how people in their own society are looking at their situation. I think it would be very welcome here and it is certainly something that I think people have expected over a long period of time.

There is a discrimination suit against the INS over discrimination. The INS has been sued over discrimination charges, and I guess it is now very much in the same situation that the FBI was a few years ago, similar charges that required remedial action. Are you aware of the current suit against the INS and are you prepared to pursue the issues that have been raised?

Ms. MEISSNER. I am aware of the suit and, in addition to that, I am aware of an internal report that has been done within INS that addresses the full range of questions that have to do with possible discrimination against African-Americans and diversity in the workforce.

Here again, I think I will owe a real debt to Chris Sale, who has taken this issue on directly and has pressed for recommendations on what needs to be done to reform the Agency from within in this regard. I would say to you that I am absolutely committed to equal employment opportunity, to affirmative action. I would say that I would not be here before you today if I had not myself been the beneficiary of efforts to reach out to women at formative points in my own career, and I certainly share that commitment where others are concerned.

The recommendations that have been made where INS is concerned go to the core of its promotion policies, its hiring and recruitment efforts. They are a comprehensive blueprint for how to correct the problems and they will have very high priority for me.

Senator KENNEDY. Do you want to express your views about immigration policies and NAFTA? President Salinas had indicated that he thinks that the NAFTA agreement will create a different economic climate in Mexico which would reduce the pressures for

people to come illegally to the United States. Have you studied this issue or reviewed the issue? Do you have any opinions about it?

Ms. MEISSNER. Well, I think NAFTA is an absolutely essential element of any kind of a long-term strategy where illegal immigration from Mexico is concerned. There is no question that the underlying conditions that create migration for economic reasons have to be addressed by growth and development in Mexico itself. NAFTA will do that. It is a long-term proposition. I think that we cannot expect any immediate, quick fixes from NAFTA where migration is concerned, but it is absolutely critical over the longer term if we intend to be serious about the disequilibrium between our two countries.

Senator KENNEDY. Comments have been made about enforcement along the border. I understand the INS experimented with Operation Blockade from El Paso to Juarez and rigorously enforced the border at, as I understand it, considerable cost. We do see a drop in illegal alien apprehensions down in El Paso from 800 a day to 150 a day. The El Paso downtown business community dropped about 90 percent in business sales. I am wondering if you are familiar with that.

Ms. MEISSNER. Well, I am familiar with it to the extent that I have read those reports, and I think it is a very interesting experiment in trying to see what is possible. It is a wonderful example of the competing priorities that we have on the border. On the one hand, you have commercial interests, and on the other hand you have enforcement interests, and I think that we need to do more of that kind of sort of pilot programming to get a good idea of what balance is the best balance to strike.

Senator KENNEDY. I see Senator Feinstein here. I would ask her if she would terminate the hearing after her questions. I want to just say we look forward to supporting you and urging the committee to take early action on your nomination, and the Senate as well. It is clearly an extraordinary background and experience.

I think one other item which has been mentioned here, but I think for those of us who follow these issues, the fact that you sponsored a Vietnamese family is really a very insightful comment about your own deep-seated caring and concern about these issues. I just think that it is an extraordinary act of generosity of spirit. You and your husband and your son and daughter ought to be commended for it. It is a great example for all Americans.

We will look forward to early consideration of your nomination, and I would recognize Senator Feinstein.

Ms. MEISSNER. Thank you, Senator.

#### OPENING STATEMENT OF SENATOR FEINSTEIN

Senator FEINSTEIN [presiding]. Thank you very much, Mr. Chairman, and good afternoon. I am sorry I couldn't be here earlier. I got a little involved on the floor in a liquid reactor debate that was going on.

We have had a good opportunity to talk and, as you know, it is going to be my pleasure to support you. I come from the State with the largest number of immigrants in the Nation. Probably close to 50 percent of the total legal and illegal immigrants live in California, and the great bulk of illegal immigrants live in California, now

believed to total close to 3 million. This has launched a debate in my State which has been quite considerable. There have been a number of proposals made.

As I mentioned to you, I had the pleasure of going to our border with the Attorney General, and she has committed to produce a program and you are the first lynch pin in that program. Much of it is directed at organizational reform first, and then some additional resources. I would like to know if you have given any thought to organizational reform, specifically the concept of a border management agency which has been suggested, and I was wondering if you might care to make any comments on that subject at this time.

Ms. MEISSNER. Well, there was some talk about a border management agency in the context of the reinventing Government initiative that the Vice President has led. Of course, you know it is certainly not a new idea. It has been proposed in a variety of permutations over the years.

It is the kind of proposal that has some immediate attractiveness to it. Upon any kind of real examination, I think it has more disadvantages than advantages, but it is not part of the administration's program at this point. It was looked at and it was not part of the final set of recommendations.

Instead, we will be taking a much more limited look, the Customs Service and the Immigration Service, at our land border activities on the southern border, and we will be looking for not only fiscal savings, but we will be looking for a much better, more consolidated, single-minded effort. That is just at the starting stages, but that is on a fast track and there will be some things to be said about that in the next several months.

Senator FEINSTEIN. Since I have been back here, I am not sure what the words "fast track" really mean.

Ms. MEISSNER. An unfortunate choice.

Senator FEINSTEIN. I once thought in San Francisco when I was mayor we did well because a building got built in 9 months, and I thought that was a fast track.

Let me just state the concern that I have. The Border Patrol operating at 50-percent effectiveness means about 2,000 people a night, which translates into close to 600,000, 700,000 people a year illegally coming across a border every year, every day, every month, and the pressure that that puts on our systems is enormous.

I feel very strongly, and one of the reasons that I am so enthused about your candidacy is that you can take not only the adoption of a Vietnamese family, but the adoption of an agency, INS, take it out of orphan status and raise it to the point where it should be today, which is a full-fledged, operating agency that is able to work just as effectively as possible. I want to help in that regard.

I mention to you that we will shortly be introducing legislation to increase the Border Patrol, to provide for bilingualism a little bit beyond what is now provided, to improve the infrastructure of the border as necessary, the equipping of the people that work in those related areas, Customs, INS, to provide special narcotics abatement help, and to fund it with a border-crossing fee.



Much of what I see here now when you propose legislation is people say, well, where is the funding going to come from. It seems to me that just as one might cross the bridge, or the 17 bridges between Mexico and Texas today, or into Michigan today, this becomes a very useful methodology to fund what you need, and also to improve the regular crossing of the border.

I have been there now on two occasions since I have been a Senator and the border gates, 24 of them, were just about one-half staffed and the backup is an hour, an hour-and-a-half—pollution, dollars lost, people waiting, irascibility rises, all of that. So the thought occurs to me, if we can adequately fund Customs, INS, Border Patrol, all of the Agencies that enforce our borders with a border-crossing fee, that makes very good sense. What would be your view of that?

Ms. MEISSNER. Well, I have no philosophical opposition to a border fee at all. We have a fee already that is a border fee of sorts because it is for airline passengers coming in and out of the country, and having a user tax for that purpose is already in practice and is acceptable.

The difficulty, of course, is the practical difficulty of not having a ticket to which to attach a border fee. So what we need to do is we need to work to find a practical way of how to collect the money, and that involves physical changes at the border. It involves accountability where cash is concerned. It involves a system of dealing with double currencies. There are a set of just everyday operational issues that need to be addressed, but I am absolutely willing to look at the issue and certainly can see what the benefits of that source of revenue would be. But I think we have to plan carefully and I think we need to sit down and really look at what the cost benefit of that kind of a tax would be.

Senator FEINSTEIN. I appreciate that very much, and I thank you because your Department has historically been in opposition to it. So this is, I think, a major change and is very much appreciated.

Another aspect of what we would hope to be able to use this money for that the legislation would permit would be to increase good citizenship potential of immigrants who are in this country in terms of enabling them more facility to learn English and to learn citizenship and, of course, with a view of becoming a naturalized citizen. I was wondering what your thoughts might be, also, with respect to the naturalization process and making people good citizens when they are here legally.

Ms. MEISSNER. Well, naturalization is an area that has always been of very strong interest to me. It is, I think, quite interesting that historically as a nation we have been quite benign about naturalization. I mean, obviously, naturalization has always been available and you apply for it, and so forth, but we have never aggressively promoted naturalization, and I think that is something that needs to change.

I think we are living in a period where we need to really make very clear the benefits of naturalization and the ways in which you get naturalization. It is a fine line because you don't want to coerce people. It is a highly personal decision and people have very personal reasons for deciding to naturalize or not to naturalize, but

they shouldn't decide not to naturalize because they are frightened of the process or they do not understand what it is that is required.

I think that if we do try to make people understand, we will find that we will increase our naturalization rates, and that is a win/win situation for everybody. It is very good for the Immigration Service. It is a positive activity. It is the kind of thing that allows us to enter into very productive working relationships with communities, with educational institutions, with a range of actors that are important for us to be connected with. It is very good for the immigrant himself because it allows them to bring their relatives legally in the way that the law intends.

I think it is a very important thing now symbolically in a time when we are seeing such strong anti-immigrant backlash because what it really says to the American people is that these newcomers, these new people in our midst, in fact, adopt our values, in fact buy into what we believe in, and are joining with us for a common cause. So I think that it is my intention to be much more active on the part of the Service where naturalization is concerned.

Senator FEINSTEIN. I have two remaining subjects I wanted to discuss with you briefly. Before I do, I might say that my bill also would hope that the border-crossing fee would fund the administration's program which is now in Senator Kennedy's bill, so we would hope to provide a methodology to fund that as well.

The other two subjects I wanted to discuss with you—the first of them is border enforcement, I believe, has to be bilateral in the sense of both the Canadians and the Mexicans and other countries. I gather China is very cooperative. I recently had an opportunity to meet with the President of China in Beijing. He assured me that China was going to do everything they possibly could to be of service to us and see that they take the necessary actions, and it was pointed out to me that they have.

I sent a letter to President Salinas and got a response to that letter which indicated that the Mexican Government was not adverse to discussing this more deeply, and I would really very much like to ask you if you would be willing to continue those discussions because I am concerned, regardless of what happens with the North American Free Trade Agreement, that this is not going to stem the tide of people coming over that border because if you are poor in Mexico, there is no help for you in terms of a welfare system or medical care or retirement programs or pension plans or things that might help you through. With a 58-cent-an-hour minimum wage, there is every incentive to continue to come.

So I think if we are to enter into an agreement with Mexico on trade issues, obviously some joint understanding with respect to the operation of a border is extraordinarily important. So my question to you is, as the Director, would you be willing to make some of those points and to work with our State Department and work with Mexico in trying to get them to come around to understand the importance of maintaining their share of border enforcement?

Ms. MEISSNER. Absolutely; I think you have put your finger on a terribly important point, and that is that when all is said and done these flows of people are an international phenomenon. No country can go it alone with global pressures such as the kind that we see and that we will be seeing, and we need not only bilateral



cooperation; we need a much more aggressive international outlook on the part of many countries to find ways of cooperating where these situations are concerned.

In the international arena, we have only one instrument that addresses these issues, and that is the refugee convention. We probably over the next 10, 20 years need a range of international instruments that set standards for how countries deal with the kinds of movements that we are experiencing.

Where Mexico is concerned, I think that we have now in Mexico a government and a rising generation of leaders that is much more interested and much more understands the fact that this is a two-way street. I endorse your sentiments in this area.

Senator FEINSTEIN. Thank you. I guess right now my understanding of an issue which I encountered when I came here—and I know there are very strong feelings on both sides on this committee on the whole issue of employer sanctions. Today, if somebody is here illegally, we obviously would like them to go home. How realistic that is, particularly when they have children and they are in school, is unknown to me.

Having said that, we also don't want them to avail themselves of our rather generous welfare system. We would like them to be able to get along based on their own industry and pay taxes. Yet, there are employer sanctions there that say any employer that hires them gets into deep trouble with our Government, and deeper trouble if they ever sit in one of those chairs and look for an appointment to the Government.

So I would really appreciate it if you could give me your views on both the point and counterpoint to this question. Do we continue with employer sanctions? Do we take another course?

Ms. MEISSNER. Well, we had some discussion on that earlier, so I am going to repeat some of the things that I said there. I do believe that we need workplace enforcement. Jobs in this country are an incentive for people to come and to remain illegally. What kind of workplace enforcement, it seems to me, is obviously an important question that is still very much in contention.

Employer sanctions basically say that the eligibility to work in this country ought to be a labor standard in the same way that paying minimum wage, not violating child labor laws, eligibility to work is an attempt to add that to the labor standards regime that we have. It is not working very well, and it is not working very well for a variety of reasons that the executive branch needs to address, but also because the legislation itself makes it very, very difficult.

The legislation leaves open this whole question of documentation and a reliable way for employers to verify the people that they hire. That, in turn, brings into play questions of discrimination, which are obviously things that we don't want to promote.

So I think that we are very much at a point where we need to reexamine the whole question of workplace enforcement, where we need to determine what it is that we ought to be doing where jobs are concerned, and I think that is something that is going to involve the Congress as well as the public, but I think the time is right.



Senator FEINSTEIN. Well, I appreciate your saying that. I would like to send you a letter I just received from a rather significant California employer who just had the INS kind of swoop in and 200 employees were arrested. They were all people that had presented fraudulent registration cards. I saw a variety of them at the border and they are very good bogus cards. They are very difficult for an employer really to know, and I imagine people can become very skilled and very sophisticated. I also understand that there is another methodology where employers will be able to check.

I think the issue of the so-called identity card will be joined when we have health care. Health care will be available through a card, holographic, for every legal resident of America, and it seems to me that that then becomes sort of a definable piece of identification for all of us who are legal residents of America to use. Perhaps we can stay away from another part of a divisive debate.

Let me just ask a final question, and that is on the area of professionalism of the Border Patrol. In my visits, I saw nothing but professionalism, and I want to say that and say that very clearly. Yet, I have met with groups in Los Angeles, in San Francisco, and in San Diego who are really filled with concern that there are abuses.

I would like to ask you how you would handle this. How would you see that the training is ongoing and really relevant to creating the most professional Border Patrol in the world today?

Ms. MEISSNER. Well, in my statement today I laid out three broad goals that I feel strongly should guide my work and the work of the Immigration Service, and the first of those goals was professionalism. I believe that professionalism is not only the Border Patrol; it is all activities in the Immigration Service that has to do with customer relations on the telephone just as it has to do with apprehensions at the border.

Obviously, the work that Border Patrol agents do is extraordinarily difficult work, and the border has become a much more dangerous place to be for the aliens and for the agents alike. The Border Patrol, I think, properly is very, very concerned about its own training, always is reviewing its training, and training is something that we have to constantly be funding appropriately and supporting, and so forth.

I think too, though, that we need to do two things, in addition. We have to be open, I think, in the Immigration Service to a much broader dialog with the public and with the groups that are concerned about abuse so that there is some real give and take. There is a good deal of defensiveness and a good deal of misunderstanding all around, and some of those channels of communication, I think, can be opened and I will try to open them.

In addition to that, there is, as there is in all police agencies, a kind of a pulling together, willingness to be terribly carefully scrutinized, and some of that has to be overcome, I think, by very clear direction from the top that only the highest standards of integrity and performance will be acceptable. I think the leadership of the Border Patrol and the rank-and-file uniformly endorse that view. I think that where abuse occurs, it is a situation of a few bad apples, but it obviously has to be checked. It has to be checked immediately and effectively, and we will do that.

Senator FEINSTEIN. Well, thank you very much. Just in conclusion, I really think you are the right person at the right time for the right mission, and I wish you great good luck. My job will be to try to support you wherever I can. Obviously, I am the last one here, so I want to say thank you very much.

Ms. MEISSNER. Thank you very much. I look forward to working with you.

Senator FEINSTEIN. I do have a statement that I will include in the record at this point.

[The prepared statement of Senator Feinstein follows:]

PREPARED STATEMENT OF SENATOR DIANNE FEINSTEIN

Thank you, Senator Kennedy and welcome Ms. Meissner. I want to say at the outset that I enjoyed our conversation last week, that I'm delighted with your deep knowledge and long experience with immigration issues, and that I have no doubt that you will make an impressive Commissioner of the Immigration and Naturalization Service. I support your nomination, therefore, wholeheartedly.

Having said that, however, I want you to understand that these times permit you no "honeymoon." It's my view that, as Commissioner, you must begin on day one to work with the Attorney General to remake the INS into a highly professional agency that lives up to its full name: the Immigration and Naturalization Service.

Coming from California, I know how badly resources are needed for personnel, equipment and infrastructure to secure the border and curtail illegal immigration—a process that absolutely has to begin on the Southwestern border with Mexico. But I also know that those activities have got to be carried out professionally—without verbal or physical abuse of persons interrogated or detained.

Just as the INS cannot remain the stepchild of the Department of Justice that it's been for so long, adequate training and oversight of the Border Patrol cannot continue to be the afterthought of the INS that—rightly or wrongly—much of the public believes it to be.

Similarly, the INS's "other mission"—to encourage and assist legal immigrants to become citizens of this country—can no longer take a back seat to the agency's enforcement functions. If the agency can't handle both jobs, perhaps we should consider divesting it of those responsibilities.

Finally, Ms. Meissner, this Committee will be looking to you, as well as to the Attorney General, for leadership in asylum reform. I am concerned that, in the process of expediting the exclusion of persons who seek to enter the United States without just cause or proper documentation, we may inadvertently sweep too broadly and exclude men—and especially women—who legitimately fear injury or death if returned to their point of departure or origin.

I recognize that there are no easy answers here and look forward to getting your thoughts on how best to address the tremendous demands now placed on the asylum system later in these proceedings.

Our mothers were both immigrants, Ms. Meissner. We share that tradition, and with it a commitment to preserving and protecting the legal immigration that has served America so well throughout its history. I look forward to working closely with you.

Senator FEINSTEIN. This committee is adjourned.

[Whereupon, at 3:55 p.m., the committee was adjourned.]





**NOMINATION OF JO ANN HARRIS TO BE ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, AND EDUARDO GONZALEZ TO BE DIRECTOR OF THE U.S. MARSHALS SERVICE**

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**THURSDAY, OCTOBER 14, 1993**

**U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
Washington, DC.**

The committee met, pursuant to notice, at 10:19 a.m. in room SD-226, Dirksen Senate Office Building, Hon. Howell Heflin presiding.

Also, present: Senators Metzenbaum, Hatch, Thurmond, Grassley, Specter, and Cohen.

**OPENING STATEMENT OF SENATOR HEFLIN**

Senator HEFLIN. We are pleased to have some Senators here who desire to introduce their nominees. Senator D'Amato is here. I think you are here to introduce Ms. Harris. Go ahead, sir.

**STATEMENT OF HON. ALFONSE M. D'AMATO, A U.S. SENATOR  
FROM THE STATE OF NEW YORK**

Senator D'AMATO. Mr. Chairman, members of the committee, first of all let me ask that my remarks be placed in the record as if read in their entirety, and I can save the committee some time.

Senator HEFLIN. Thank you.

Senator D'AMATO. But I would be remiss if I did not say, Mr. Chairman, that I am tremendously honored and pleased to be able to introduce to this committee Jo Ann Harris, whom the President has nominated to be the Assistant Attorney General in charge of the Criminal Division.

She is outstanding. She is a lawyer's lawyer. She has a reputation and a background that uniquely qualify her for this position. Having graduated from NYU cum laude, she clerked for one of our judges in the second circuit, a distinguished judge, Judge Pierce, from 1972 to 1974. From 1974 until 1980, she was the co-deputy chief of the criminal division in the Southern District of New York. She left for a short period of time and came back again in 1981, where she held the position of senior litigation counsel responsible for the trial of major criminal and civil cases.

Let me, if I might, because I think it is worthy of note, quote a little excerpt that comes from the New York Law Journal about Jo Ann Harris as lead counsel in the prosecution of the Reverend

Moon case, Reverend Moon having been accused of siphoning off millions of dollars, et cetera, a very complex, long case.

In that case, one of the opposing lawyers, Charles Stillman, said of the case he could point to no lawyer—now, remember, this is counsel on the opposite side—no lawyer who could bring a better sense of balance and justice to the big, tough decisions that had to be made when setting policy for criminal prosecutions at the national level. I think that says it all.

I am proud to present her. I would like to introduce her husband, Gregory, whom I have known for a while. He is president of the New York State Air Force Association. Gregory, it is good to have you with us. He is a very important constituent of mine. Literally thousands of people listen to him, and so that is why he is tremendously important.

There was one other thing. In 1978, the U.S. attorneys women's basketball team won the league championship. I want you to know that Jo Ann Harris was the center on that team. [Laughter.]

She is an excellent advocate, a great scholar, a person of great balance and tremendous background, and I want you to know that I believe that in the Justice Department, in the Criminal Division, we need people who have that balance. We need desperately to have people who are going to look at the law and the manner in which it should be applied, who are not going to be looking for scalps and have the kind of balance that says, yes, we are going to be tough, but we are going to be fair. I think Jo Ann Harris is that kind of person, so I am delighted to present her to this committee.

[The prepared statement of Senator D'Amato follows:]

#### PREPARED STATEMENT OF SENATOR ALFONSE M. D'AMATO

Mr. Chairman, I am honored today to present to this Committee Jo Ann Harris, whom the President has nominated to be an Assistant Attorney General for the Criminal Division. It is with great pleasure that I bring Ms. Harris before this Committee. I would also like to welcome her husband Gregory, who is currently the President of the New York State Air Force Association.

Jo Ann Harris comes before this Committee with a distinguished background. After graduating Cum Laude from New York University in 1972, Ms. Harris began her legal career as a clerk for Judge Lawrence W. Pierce, a former U.S. District Judge in the Southern District of New York.

Ms. Harris then began a nine-year career as a prosecutor. In 1974 she became an assistant U.S. Attorney in the Southern District, and rose to become the co-deputy chief of the Criminal Division. In 1979, Ms. Harris moved to Washington, D.C. as Chief of the Fraud Section in the Department of Justice Criminal Division headquarters.

As her expertise in criminal law expanded, Ms. Harris was hired in 1981 by the U.S. Attorney's office in the Southern District. There she held the position of Senior Litigation Counsel, responsible for trial of major criminal and civil cases and for training Assistant United States Attorneys throughout the country. Ms. Harris' hard work there earned her the title of Executive Assistant U.S. Attorney, the Office's number-three position.

In the 1983 case of *United States v. Sun Myung Moon*, Jo Ann Harris led the government team in the prosecution of Sun Myung Moon on obstruction of justice and tax charges. Reverend Moon was charged with filing false income tax returns and members of his church were charged with blocking the investigation of those returns. Ms. Harris's commanding presence in the courtroom coupled with her impressive knowledge of criminal trial procedure were key factors in the government's impressive victory in the courtroom. "The New York Law Journal" quoted Charles Stillman, one of the lawyers opposing Ms. Harris in the Reverend Moon case, as saying " \* \* \* he could point to no lawyer who could bring a better sense of balance

and justice to the big, tough decisions that have to be made when setting policy for criminal prosecutions at the national level."

Ms. Harris's law experience also includes an extensive teaching resume, having been a visiting or adjunct professor at such schools as Emory, Fordham, Harvard, Hofstra, New York Law, Pace, and the National Institute of Trial Advocacy.

However, no introduction of Jo Ann Harris would ever be complete without including her achievements as the star center of the U.S. Attorney's women's basketball team. It was her excellent athletic ability which led the team to their first League Championship in 1978.

Mr. Chairman, I am confident that Jo Ann Harris will prove worthy of this Committee's support. She has the experience necessary to undertake the position of Assistant Attorney General with the highest degree of competence. Through the span of her career, Ms. Harris has proven that the overwhelming power which she has been granted as a federal prosecutor can be used to the benefit of all Americans. It is with great honor that I present Jo Ann Harris to this Committee.

Senator HEFLIN. Thank you. We will ask you if you will now, Ms. Harris, step aside and we will have the introduction of Mr. Eduardo Gonzalez, to be the Director of the U.S. Marshals Service. Senator Graham and Senator Mack are here and we would be delighted to hear from them.

#### **STATEMENT OF HON. BOB GRAHAM, A U.S. SENATOR FROM THE STATE OF FLORIDA**

Senator GRAHAM. Thank you very much, Mr. Chairman and members of the committee. It is a great honor to be able to introduce today Mr. Eduardo Gonzalez as the nominee to be Director of the U.S. Marshals Service.

Chief Gonzalez, as those of us in Florida have come to know him, has served the State of Florida with distinction. In the Metropolitan Dade County Police Department, he served in important administrative positions from 1965 to 1992, a period of 26.5 years, with one of the largest and, I think, most professional law enforcement agencies in local government in the country. Since March 1992, he has served as chief of police of Tampa.

During this period, Chief Gonzalez has been known as one who was confident, innovative, and had an inherent ability to work with others. He was instrumental in evolving both police departments from a traditional model of policing to a more contemporary community-oriented model long before that was popular.

In February of this year, I had the privilege of working for Chief Gonzalez during a day spent with the x ray squad, a community-oriented policing program that patrols public housing areas such as Ponce de Leon and College Hill. During that experience, we worked on foot, we worked on bicycles, in cars, but a great deal of time was spent dealing directly with the people of those communities to build up a relationship of trust between law enforcement and the citizens. I also learned about leadership. I learned about the special respect that the police on the beat had for Chief Gonzalez.

Obviously, the President and the Attorney General have deep respect for Chief Gonzalez or they would not have nominated him to this important position, but it is another, I think, equally important fact that he is so highly regarded by those who have worked under his leadership and command.

In September, I met with Chief Gonzalez informally to discuss his thinking about the future of the Marshals Service. He noted the fact that the U.S. Marshals Service is one of the Nation's oldest Federal law enforcement agencies and has the increasingly difficult



task of providing a range of services—court security, Federal fugitive apprehension, witness protection, prisoner transportation, maintenance of drug-related, seized assets, and the service and execution of Federal court orders.

He also expressed concern about the problems of the Marshals Service, problems relating to diversity, organization, communication, resource allocation within the Service and within the judiciary. I was impressed by his knowledge and thought. I believe that he undoubtedly will hit the ground running once he is confirmed. In fact, in just a short time I am certain that the Nation will come to know the quality of Chief Gonzalez as Floridians have known it for almost three decades.

Mr. Chairman, I appreciate the opportunity to introduce to this committee an outstanding nominee and urge Chief Gonzalez' early confirmation as Director of the U.S. Marshals Service.

Thank you.

Senator HEFLIN. Senator Mack.

#### **STATEMENT OF HON. CONNIE MACK, A U.S. SENATOR FROM THE STATE OF FLORIDA**

Senator MACK. Mr. Chairman, members of the committee, it is a pleasure to be here today to introduce Mr. Eduardo Gonzalez for confirmation as Director of the U.S. Marshals Service. I would like to add that I am particularly pleased to be here because Eddie is the second Floridian in recent years to be appointed to this position, the former being the Honorable Michael Moore.

Those who have worked closely with Eddie have the highest regard for his abilities as a law enforcement officer, his talents as a manager, and his personal integrity. Over the course of his career, from a patrol officer in Miami to the chief of police in Tampa, Eddie acquired these traits through his unyielding commitment to law enforcement and his community.

He clearly understands the crucial link between law enforcement and community, and he is active in many different organizations that promote these ideals. Holding true to this principle, Eddie's work as chief of the Tampa Police Department led to a better relationship between the community and the department.

Prior to becoming the chief of the Tampa police, he served in numerous capacities in the Metro Dade Police Department, concluding with the position of deputy director of the department, which he held for 6 years. In his last year at Metro Dade, he administered a budget that totaled approximately \$254 million, and which supported 3,753 authorized positions.

One final note about Eddie's career which I believe makes him uniquely qualified for this position: From 1980 to 1983, he served as the chief of the court services division at Metro Dade. I am told that the division's responsibilities are similar to those of the Marshals Service and that the division works closely with the Service on various matters. Eddie performed these duties, as with each of his assignments, in an exemplary manner.

I look forward to working with him over the next several years to make sure the Marshals Service works closely with Florida officials to help combat the serious crime problems which we now face. I have no doubt that the nominee's experience in law enforcement

and his commitment to community and country will not only be of benefit to Florida, but also to our Nation.

I greatly appreciate the opportunity to present Eddie to the members of the committee and I urge you to vote favorably for this nomination.

Thank you, Mr. Chairman.

Senator HEFLIN. Thank you. Senator Simon wanted to be here to participate in the presentation of Jo Ann Harris—she is an Illinois native—but he is chairing a hearing and he asked that his statement be entered into the record, and it will be so entered.

[The prepared statement of Senator Simon follows:]

#### PREPARED STATEMENT OF SENATOR PAUL SIMON

Mr. Chairman, I wish to express my strong support for Jo Ann Harris, who has been nominated to be Assistant Attorney General in charge of the Criminal Division at the Department of Justice.

An Illinois native, Ms. Harris decided to go to law school after several years in journalism. After clerking for Judge Lawrence Pierce in the Southern District of New York, she worked as an Assistant U.S. Attorney and later Deputy Chief of the Criminal Division in the U.S. Attorney's Office for the Southern District of New York.

For several years during the Carter Administration, Ms. Harris served as Chief of the Fraud Section of the Criminal Division at the Department of Justice, after which she returned to the U.S. Attorney's Office in the Southern District of New York where she rose to second in charge.

Since that time, Ms. Harris has been in private practice and has taught law at various universities. She has also been active with the Pace University Battered Women's Justice Center.

Support for this nominee is very, very broad—and with good reason. Clearly, her legal background as a prosecutor, a defense attorney and an academic, and her sensitivity to those less fortunate will enable Ms. Harris to serve the nation well as Assistant Attorney General for the Criminal Division. I look forward to her confirmation.

Senator HEFLIN. If there are other statements that would like to be entered into the record pertaining to introductions, we will be delighted to keep the record open until the end of the day for that.

We will excuse the Senators because we know they have many other things to do.

If Ms. Harris and Mr. Gonzalez will come forward and raise their right hands, I will give them the oath.

Do each of you solemnly swear that the testimony that you will give at this hearing will be the truth, the whole truth and nothing but the truth, so help you God?

Ms. HARRIS. I do.

Mr. GONZALEZ. I do.

Senator HEFLIN. We will also now have opening statements from any of the Senators that are present. Senator Hatch, do you have an opening statement?

Senator HATCH. I do, Mr. Chairman. I appreciate it, and I would ask that my full statement be placed in the record at this point.

Senator HEFLIN. It will be so ordered.

#### OPENING STATEMENT OF SENATOR HATCH

Senator HATCH. As this administration continues our Nation's battle against drugs and violent crime, the Judiciary Committee will be hearing from President Clinton's nominee to be Assistant Attorney General for the Criminal Division, Jo Ann Harris.

Ms. Harris, I believe you have a very distinguished record as a prosecutor, criminal defense lawyer and, of course, as a law school professor. From what I see, you are an excellent choice for this position.

The committee also, of course, is hearing from Eduardo Gonzalez, the President's nominee for Director of the U.S. Marshals Service. Chief Gonzalez has been in law enforcement for over 28 years, rising through the ranks of the Metro Dade Police Department in Miami, FL, as both of the Senators have said, and I am pleased to see you have this opportunity myself.

As you know, our State of Utah is very concerned about crime, criminal activity, youth gangs, rural crime. We are a transshipment State for drugs. We have got problems that I think are duplicated in many similar smaller rural States and States that have good highways systems.

I have been troubled with what I would consider less resolute signals coming from this administration, especially with regard to drug and crime control. I have raised these concerns during previous confirmation hearings of Justice Department officials and I have raised it on the Senate floor.

I don't mean to be critical, but I don't think the administration has taken these areas as seriously as they should, and perhaps the reason is that you are not in place yet. But I am hoping, Ms. Harris, as you get into place, and you, Mr. Gonzalez, that you will really take this seriously. We have got to have an antidrug policy in this country and in this administration that makes a difference.

It seems to me that we have got to have an approach that really attacks the root causes of crime as part of it, but that, to me, is only part of it. I think we have got to go way beyond that. General Reno is concerned about those things and I think we all are, but I believe that we have to spend dollars on treatment and alternative sanctions only after we have ensured the law-abiding people of America that we have adequate prison space to house those who should be there.

In my view, I think this administration has let the American people down by a sharp decrease in prison cells and construction. As you recall, there is currently over \$1.1 billion in prison construction funds waiting to be spent. Instead of using it to build prisons, the Department astonishingly called for a \$130 million reduction in prison construction funds. They rescinded over \$130 million, and to me that is a giant step in the wrong direction.

I would like to see you really take this seriously once you get there and work with us up here. I would like to see a bipartisan effort against crime rather than the constant beating of our breasts up here and screaming and shouting on both sides of the issue in the ways that have occurred in the past, as we have failed to enact really effective anticrime legislation. I think we can do it this year if we would get rid of some of the politics and do what is best for our American people.

There are a lot of other things that I wish I could stay to ask questions on, but I have to be to a Finance Committee markup on NAFTA, and I think the President wants us to help on that as much as we can and I certainly have been trying. But I am proud to see both of these nominations. I think you are both excellent



people from all that I can see and I intend certainly at this point to support both of you. It is important we get both of you in place, and especially you, Ms. Harris, because this position has gone unfilled for too long a time already, and you can count on me to be open and to do everything I can to assist you in this job and being able to do it in a way that it really needs to be done.

So, thanks for being willing to serve, both of you, and welcome to the committee. Thank you very much.

[The prepared Statement of Senator Hatch follows:]

#### PREPARED STATEMENT OF SENATOR ORRIN G. HATCH

As this Administration continues our nation's battle against drugs and violent crime, the Judiciary Committee will be hearing from President Clinton's nominee to be the Assistant Attorney General for the Criminal Division—Jo Ann Harris. Ms. Harris has a distinguished record as a prosecutor, criminal defense attorney and law school professor.

The Committee will also be hearing from Eduardo Gonzalez, the President's nominee for Director of the U.S. Marshals Service. Chief Gonzalez has been in law enforcement for over 28 years, rising through the ranks of the Metro-Dade Police Department in Miami, Florida. I am pleased to have both of these nominees before the Committee.

Utahans are increasingly concerned about violent crimes, gang activity, and drug dealing in our state. The federal government has an important role to play in combating these crimes.

For this reason, I am troubled by some of the less than resolute signals coming from this Administration on the issues of drug and crime control. I have raised these concerns during previous confirmation hearings on Justice Department officials and on the Senate floor.

This Administration seems to be very focused on the "root causes" of crime, on alternatives to incarceration, and drug treatment. I do not quarrel with the need to treat those who are in fact treatable. Yet, I believe dollars should be spent on treatment and alternative sanctions only after we have ensured the law-abiding people of America that we have adequate prison space to house those who should be there. In my view, the Administration has let the American people down by not supporting a sharp increase in prison cells.

There are, unfortunately, many dangerous people out there. We need to put them away for a long time—that is the most important thing we can do to combat violent crime. The Administration seems to think that our nation's prisons are filled with people who shouldn't be there. Yet, the Bureau of Justice Statistics reports that 94 percent of all state inmates are either violent or repeat offenders.

The Department could at least spend the prison construction money it already has. There is currently over \$1.1 billion in prison construction funds waiting to be spent. Instead of using it to build prisons, the Department, astonishingly rescinded over \$130 million in prison construction funds. This is a giant step in the wrong direction.

The Dole-Hatch "Neighborhood Security Act" authorizes \$3 billion for prison construction and operation over the next five years, and we pay for it. This includes construction of regional prisons in which state violent offenders can be housed.

Instead of funding more prison construction, the Democrat crime bill, which the Department of Justice endorses, actually authorizes the early release of convicted violent inmates—up to one year early—if they complete a drug treatment program. The Attorney General, recently said, "the \* \* \* thing we've got to do in both the state and federal systems is make sure we get truth in sentencing." ["Legal Times", October 4, 1993]. Determinate, true sentencing already exists in the federal system—we have binding sentencing guidelines and there is no parole. But the Administration's crime bill guts truth in sentencing by permitting federal inmates, violent or otherwise, to sign up for early release if they complete a drug treatment program. I would love to see the sign up sheet for this program at Leavenworth or Marion prisons.

In a reversal of the policy of Republican administrations, the Clinton Administration bill also drops a tough provision which authorizes the death penalty for drug kingpins. The measure has previously passed the Senate and the House by overwhelming numbers. I believe this death penalty is constitutional. Instead of being solicitous of the supposed rights of drug criminals, a real crime fighting Administration would have supported this provision and defended its constitutionality in court.

On the subject of drugs, this Administration is past due on providing Congress and the nation a national drug strategy. Despite the absence of such coherent planning, the White House has already concluded that the Drug Enforcement Administration should be merged into the FBI, a proposal concerning which I have many questions.

Despite the call for additional law enforcement officers on the street, their bill also cuts current law enforcement grants to states by 75 percent unless they comply with unprecedented and costly mandatory counsel standards for convicted murders seeking to overturn their death sentence. Placing law enforcement officers on the streets appears secondary to giving convicted murders new attorneys. Incidentally, this would cost my state of Utah over \$2.6 million. Alabama would lose over \$5.1 million in law enforcement formula grants.

This Administration supports a habeas corpus "reform" proposal which is more favorable to convicted murderers seeking endless appeals of their sentences than current law. This is another turning back of the clock from Republican predecessors. The habeas corpus reform proposal in the Dole-Hatch bill, which passed the Senate 58 to 40 in the last Congress, is a true limitation on these abuses.

Yet another area of this Administration's retreat on crime is the recent Department of Justice decision to support the appeal of a repeat offender convicted of trafficking in child pornography. In one more repudiation of its Republican predecessor's hard-nosed stand, the Department actually filed a brief before the Supreme Court arguing for a narrow interpretation of the federal law prohibiting the sale and possession of such material. This is a case in which the Republican Administration had won the conviction against the child pornographer and had the conviction upheld on appeal.

These are but a few of the growing list of examples of where this Administration appears soft-headed in its approach to crime and drug control. As Assistant Attorney General, Ms. Harris will play a vital role in implementing or revising these policies.

For these reasons, I look forward to today's testimony and to discussing these issues at length.

Senator HEFLIN. Senator Thurmond, do you have an opening statement?

Senator THURMOND. No, I have no opening statement.

Senator HEFLIN. Ms. Harris, if you will come forward, we are delighted to have you today. You have a background of participation in criminal law. I can't think of any administration that I know of or have read of who has looked at individuals who have a background and experience in criminal law as much as this administration, Janet Reno being a district attorney and coming from a large center where she knows the problems of drug wars, and Phil Heymann, who has a distinguished career as an Assistant Attorney General in charge of the Criminal Division and as a professor and as a person who has been very active, and now you.

I don't think that there has been any administration that has had individuals that have been appointed to the positions in the Department of Justice who have a better knowledge in regard to the operation. We know that individuals are the ones who make changes occur relative to situations that have developed, and we look forward to the fact that you will have people working with you with great backgrounds in regard to criminal law enforcement.

If there are members of your family or friends that are here that you would further like to introduce, we would be delighted for you to do that.

#### **TESTIMONY OF JO ANN HARRIS, TO BE ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE**

Ms. HARRIS. Actually, Mr. Chairman, Judge, Senator, there are a few more words that I really would like to say about my family.



Senator HEFLIN. All right. Thank you.

Ms. HARRIS. I am honored to be here, but I want to say that it is because of Greg that I am here. He is the one who is responsible for my coming forth and taking up this challenge, and let me just explain to you. This man is one of the original Tuskegee airmen, the black Air Force, or Army-Air Force unit in World War II.

Last spring, as it became apparent that I was going to have the chance to be named for this job, and as I was struggling with personal plans and the hardship that I knew that this would cause Greg, he came to me and he said very simply, do it for the country. That may sound corny and pretentious, but those simple words came from an American patriot, and that is the stock that I come from as well. My parents, if they were alive today, would be here saying exactly the same thing, do it for the country, and I simply hope that the job I do, if confirmed, will be worthy of those words.

Thank you.

Senator HEFLIN. Well, let me ask you a few questions. You have had experience as a Federal prosecutor, as head of the Department of Justice's Criminal Division Fraud Section, as a white collar criminal defense attorney, and as a law professor and a lecturer. How have these experiences prepared you for the position for which you have been nominated?

Ms. HARRIS. Let me begin with my concept of the position for which I have been nominated, and it is that I will be leading the Federal criminal law enforcement efforts of this country and leading a very large division of the Department of Justice in Washington.

My view of the experience that prepares a person for this job is, first, as a line prosecutor, starting with small cases, working through big cases, then as a supervisor of line prosecutors in the U.S. attorney's office in New York. I didn't do just fancy white collar cases. I did drug cases, bank robberies. I have done every kind of Federal prosecution, and supervised assistants and taught assistants—that is, assistant U.S. attorneys—how to do those cases. That is important, I believe.

Then my experience in the Department of Justice, when I came down as Chief of the Fraud Section, I think, just widened my perspective so incredibly because I learned how to manage a rather large unit of people and I learned the policy development, the strategic law enforcement policies that had to be developed on a national scale as opposed to one-district scale.

My teaching is important to me, and it is important to me because I care very much about the development of young lawyers who are dedicated to the fair and forceful pursuit of the law. All of those experiences, I think, will help me do the job, if confirmed, and it will make me worthy of your confirmation.

Senator HEFLIN. Obviously, there are a lot of people who support the death penalty in some instances who are concerned about, or have expressed some concern about your involvement with a committee that expressed some concerns about the death penalty. As head of the Criminal Division, would you have any hesitation in enforcing statutes that include the Federal death penalty, even though you may personally have some feelings relative to the death penalty?



Ms. HARRIS. Mr. Chairman, my training is as a Federal prosecutor enforcing the criminal law. If there are criminal statutes that are constitutionally valid and sound involving the death penalty, I will fulfill my responsibility, but let me add that I personally am troubled by the use of the death penalty.

Senator HEFLIN. If confirmed, there are many crucial matters that will confront you as Assistant Attorney General for the Criminal Division. A recent editorial in the Legal Times entitled "Crime-Stopping Reinvention" says it is a truism that if everything is a priority, then nothing is. If confirmed as Assistant Attorney General for the Criminal Division, what would be your priorities for Federal criminal law enforcement, and why?

Ms. HARRIS. I have not seen that particular editorial, Mr. Chairman, but let me put it this way. My first priority, if confirmed, is to survey and evaluate the allocation of resources right now in the Criminal Division of the Department of Justice and to make sure that we are allocating those resources in line with what are the moving, important enforcement issues that we are facing right now.

Clearly, among those are violent crime, drugs. I see those things very related. I am concerned about the terrorism aspects of violent crime and what this country may be facing. Those are the kinds of priorities, but may I say this as well. We cannot forget the damage that white-collar crime does to the confidence of people in this country, and part of my evaluation of the allocation of resources in the Criminal Division will be to make sure that our white-collar resources are being focused on what are the burning problems in white-collar crime.

Senator HEFLIN. If confirmed, your relationship with U.S. attorneys will be critical. What do you consider to be the Assistant Attorney General's role in supporting and guiding U.S. attorneys throughout the country?

Ms. HARRIS. I should have said in answer to one of your earlier questions that part of my background here that helps me, I believe, fulfill the responsibilities of the job of Assistant Attorney General is the fact that I have worked in a U.S. attorney's office and I know that culture very well, as well as the culture in the Department of Justice.

I believe that actually the two simple words that you have used are sort of the benchmarks of what the relationship should be. It should be guiding in the sense that I believe the Criminal Division should be responsible for the development of national policy and of working with the U.S. attorneys to develop strategic law enforcement techniques to address the serious crime problems.

And the Criminal Division should be supporting the U.S. attorneys in all the ways that the Criminal Division does support the U.S. attorneys. We have reservoirs of expertise in particular areas. The U.S. attorneys will always be the chief law enforcement officers of their districts, but this country in its own way is getting smaller and smaller and as far as working together on national strategies, I hope, because of my background, because of the people involved, that I can work very closely with the U.S. attorneys.

Senator HEFLIN. I know you were involved in drafting a report by the Association of the Bar of the City of New York that supports

the position that Justice Department lawyers are bound by the code of professional responsibility. What steps would you take as head of the Criminal Division to ensure there is no misconduct or abuse of office by U.S. attorneys?

Ms. HARRIS. Let me address your question generally first. I feel very, very strongly that credibility of Federal prosecutors in terms of their ethical conduct is so important to the perception and the reality of Federal law enforcement in this country. We must have prosecutors who are fair and forceful, and perceived to be that way.

In terms of this issue relating to the professional code of conduct, as you know, there is a rule right now that is out for comment relating to certain ethical questions. That report from the Association of the Bar, which I signed and which a lot of prosecutors signed, actually calls for a balanced look at some very complicated issues relating to the code of ethics and, as I say, it is under consideration right now.

Let me cut through that and just say very plainly, Federal prosecutors must get up every morning with one thing in mind, to go into the office and to forcefully enforce the Federal criminal law fairly and effectively without fear or favor, and that is what I expect every one of them to do.

Senator HEFLIN. Do you think that existing safeguards are sufficient to maintain ethical standards governing prosecutorial misconduct?

Ms. HARRIS. Senator, I hesitate only because I so firmly feel that it is so important that Federal prosecutors operate at the highest ethical standards and be perceived to be so that I haven't really looked at it in terms of State rules of conduct. As you know, State rules of conduct vary from State to State, and so it is difficult for me to answer the question in terms of State rules of conduct. But I assure you, and I hope my background says this, that one of the most important things that I believe is that Federal prosecutors must be perceived and actually act at the highest standards of conduct.

Senator HEFLIN. What type of relationship do you think the Assistant Attorney General for the Criminal Division should foster with State and local prosecutors and local law enforcement?

Ms. HARRIS. I believe, and have believed for a long, long time, that there is more than enough work for all of us to do, and I believe that we should be working together not only nationally in terms of task forces and formulating strategies, but in every district in this country Federal prosecutors should be working with State prosecutors. We should be working to bring together Federal law enforcement agencies, State law enforcement agencies. We are all on the same side, and I will do everything I can to effect that cooperation.

Senator HEFLIN. Since their inception, the Federal sentencing guidelines have been the subject of debate and controversy. In fact, one district court judge recently resigned because, according to press accounts, he could no longer follow Federal sentencing guidelines in criminal cases. The press reported that this Federal judge that mandatory guidelines were too harsh and too rigid.



As head of the Criminal Division, how would you address the argument that the guidelines are too inflexible and may impose sentences that are disproportionate to the severity of the offense?

Ms. HARRIS. Mr. Chairman, I believe in the goals of the sentencing guidelines and I believe in the flexibility that the Sentencing Commission has been given in terms of those guidelines. As you have noted, I was a defense attorney for a period of time and, in connection with that, was on the CJA list representing indigent defendants.

Anecdotally, from time to time, I think that the guidelines can be viewed as inflexible, and that is why the Commission, I think, you know, works through these issues, considers these issues all the time, and is able to make adjustments.

Senator HEFLIN. You have written articles and lectured on the subject of RICO, the Racketeer Influenced and Corrupt Organizations Act. As you know, this statute is commonly used against organized crime figures, drug traffickers, and Wall Street criminals. The statute provides for harsher fines, prison sentences, and forfeiture of earnings. Do you have any thoughts on how the Justice Department can more effectively use this statute to prosecute white collar criminals?

Ms. HARRIS. Mr. Chairman, I believe that the RICO statute is one of the most effective crime enforcement tools that you have given us. I think that through the years the Department of Justice has recognized that and has worked with U.S. attorneys' offices in terms of using that statute effectively.

As you know, the Organized Crime Section of the Department of Justice has jurisdiction over the use of that statute, and I think that statute is used very effectively. We will always look for ways to use any tool that you give us more effectively, but RICO is working.

Senator HEFLIN. Well, is there any danger that it would be used in cases where it isn't really justified? There is some criticism pertaining to that, which means that maybe there ought to be some supervisory approach in regard to whether its use is allowed in an improper case for it.

Ms. HARRIS. I am very sensitive to those kinds of powerful tools being misused. I think a lot of criticism has come, Mr. Chairman, in connection with the use of the civil RICO statute. The Department is very sensitive to the misuse of that statute in the criminal context. I mean, I would be happy to work with you in terms of making that statute fairly and effectively used because I am always concerned about overuse and misuse of those kinds of tools.

Senator HEFLIN. Senator Thurmond, do you have some questions?

Senator THURMOND. Thank you, Mr. Chairman. Ms. Harris, we are glad to have you with us. I wanted to commend you for your fine record of service in the past, and I wish you well in your new work.

Ms. HARRIS. Thank you, Senator.

Senator THURMOND. I have just a few questions here. I am concerned very much about habeas corpus and the death penalty, as you know. I believed you stated that you would enforce a constitutionally sound Federal death penalty. Is the existing Federal death



penalty contained in title 21 for drug-related murders constitutionally sound, in your opinion?

Ms. HARRIS. I have not studied that statute, in particular, and so I would hesitate to state here an opinion relating to its constitutionality, Senator.

Senator THURMOND. I presume you will be studying that soon, then.

Ms. HARRIS. Yes.

Senator THURMOND. Ms. Harris, as you know, Senator Biden recently introduced S. 1441, the Habeas Corpus Reform Act of 1993, and this language was then incorporated into S. 1488, which has been described as the Clinton administration's omnibus crime bill.

California Attorney General Daniel Lungren, who incidentally is a former Member of the House and is very interested in crime matters, and Fresno District Attorney Edward Hunt, president of the California District Attorneys Association, oppose this particular habeas reform, stating that it will undermine the death penalty and promote more delay and litigation. They cited a number of concerns, from tolling provisions to mandating expansive appointment of counsel.

Given the significant disparity of opinion concerning the merits of the habeas language in S. 1488, would you recommend that the Judiciary Committee hold hearings on this important issue, or do you favor bypassing the committee and adopting the current bill as introduced?

Ms. HARRIS. Senator, let me say this about the habeas statute. I, as you know, not confirmed, have not been working on the legislation at all. The principles that are driving, I think, everyone's concern about habeas reform are finality—that is, no more delays—and fairness. With respect to those principles, I fully agree, but any more detail with respect to that statute would—it just wouldn't be appropriate for me to comment because I simply don't have the background for it.

Senator THURMOND. Ms. Harris, would you be willing to sit down and talk to Attorney General Lungren to discuss these changes to the habeas reform language that is currently supported by the administration, if it is supported by the administration? Would you mind talking to him about these matters?

Ms. HARRIS. If confirmed—and I must say that because I think it would not be appropriate for me to talk with him before then, but I will sit down and talk with anyone about that topic.

Senator THURMOND. I thought it might be helpful to both of you to discuss it because he has raised some points that you may feel should be sustained, and we want to recommend some changes in the law if you agree with him.

Now, on September 23d Chairman Biden introduced a bill, as I mentioned, S. 1488, which some have touted as the administration's crime bill. The same day, Chairman Brooks in the House introduced a bill, H.R. 3131, which was arguably the administration's crime bill. Yet, these bills are somewhat different. You haven't had a chance to study these bills yet, I guess, have you?

Ms. HARRIS. That is correct. I have not, Senator.

Senator THURMOND. It would be helpful to have your opinion because they are not in agreement on some things and I think it would be helpful if we had your opinion about them.

Ms. HARRIS, what is the Department's current position on Operation Triggerlock, which started under the Bush administration? As you know, this was an aggressive effort to prosecute Federal offenses involving firearms.

Ms. HARRIS. My opinion of Operation Triggerlock is that it works. It doesn't matter to me what administration introduced it. I think it is a good idea. I think that it is an example of the kinds of ways that we can use the Federal law to address problems of violence, and it, in my judgment, serves as a model that we might very well try to use in other areas.

Senator THURMOND. Ms. Harris, finally, I would note that Senator Grassley intends to ask you questions concerning the position taken by the Justice Department before the Supreme Court in *Knox v. United States*. As you know, this involves the Federal child pornography statute. I am concerned with the Justice Department's interpretation of the statute in this case and look forward to your response to Senator Grassley's inquiries. If you will look into that, too, I think it would be helpful to get your opinion on that.

Ms. HARRIS. Let me say to you, Senator, and I will say it to Senator Grassley as well, I believe in the vigorous enforcement of the child pornography laws. It is important to me.

Senator THURMOND. I don't think I have any more questions. I just again want to wish you well in this position. I will be glad to support you.

Ms. HARRIS. I look forward to working with you, Senator.

Senator HEFLIN. Senator Specter, do you have some questions?

### OPENING STATEMENT OF SENATOR SPECTER

Senator SPECTER. Mr. Chairman, Senator Cohen was here earlier than I. I would be glad to defer to him.

Senator COHEN. Go ahead.

Senator SPECTER. He has deferred back to me.

Senator COHEN. I may want to reconsider that by the time you finish your questioning.

Senator SPECTER. I promise to be relatively brief.

I had an opportunity to meet with Ms. Harris, and at the outset I say that I am delighted to see an experienced prosecutor in this very important position. I think your credentials as a State prosecutor and as a Federal prosecutor are very, very important. It may be that nobody has a better job in Washington than the Attorney General or the Assistant Attorney General for the Criminal Division. It is a very challenging job.

I would like to cover just a couple of points which we talked about in our meeting, and to reemphasize in this hearing a couple of items. First, the armed career criminal bill is a bill which was enacted during the tenure of all of us here. In 1984, we made it a mandatory 15-year-to-life sentence for a career criminal found in possession of a firearm, which was an effort to bring Federal law enforcement into street crime, robberies and burglaries specifically. It was expanded in 1986 to include drug offenses and some others.

When I was district attorney, I found that I had a great many career criminals that I could not bring to trial because of judge-shopping and problems of calendar control in the State courts, and that it would have been enormously helpful to have Federal intervention with speedy trial, pretrial detention, where appropriate, and mandatory sentences which would enable a State prosecutor, on leverage, to get perhaps 5 to 10 years or 4 to 8 years. It would have been satisfactory compared to the sentences which we got.

You and I have covered that in our private meeting. I just wanted to emphasize in this hearing my own view of the importance of that statute and its ability to serve as a focal point for task forces such as the one that was set up in the Eastern District of Pennsylvania, and would ask for your assurances that you will study it and do what you can to work hard on street crime.

I would be interested in your own evaluation, to the extent you have one at this point, about the value of the Armed Career Criminal Act.

Ms. HARRIS. Senator, first of all, you have my assurances that I will study this very carefully. It is, again, an example of the kind of work that you and State prosecutors and Federal prosecutors can do to work together to attempt to address the problems of crime in the streets and, in particular, the criminals who are repeat offenders who must be gotten off our streets and put away for a long time.

Senator SPECTER. The Supreme Court is considering the interpretation of the armed career criminal bill in terms of the finality of convictions, and it may be that they are looking for congressional intent. I do not know the details of the record in that case. I noted it just yesterday in the press.

If they are searching for congressional intent, I think it is fair to say, and I believe the record will support, that it was not our intent to have every State conviction reexamined and retried. If that is to be the case, there is hardly any value in relying upon a conviction to establish a career criminal status to impose the mandatory sentences.

I noted in this morning's press Justice Scalia's erudite comments about congressional intent. He is questioning what Congress had in mind on the retroactivity of the 1991 Civil Rights Act, and his statement was maybe Congress didn't have anything in mind on that or had forgotten it, was the import of his comment.

It may be that the total of the IQ's of the 100 Members of the Senate do not total the IQ's of the 9 Supreme Court Justices, or perhaps even Justice Scalia's IQ. I am not sure about that, but I can assure Justice Scalia that we did think about it and it was a tortuous process in 1990. Senator Hatch and former Secretary of Transportation Coleman and I worked for 10 days practically around the clock to try to get a compromise agreement, which ultimately failed by a single vote. Then the Civil Rights Act of 1991 was finally passed under extraordinarily difficult circumstances.

I know that Supreme Court Justices never have a situation where they leave language fuzzy to try to get a fifth vote on a holding and, of course, congressional action on trying to work out these tough compromises may be derelict in not being able to get language which is as precise as one side or the other would like.



But if the question comes up, and you may have some input into that deliberation on the armed career criminal bill, accept my invitation to take a look at the record, which I think will show our intent was not to go behind every conviction and have it relitigated.

One other comment, and that pertains to habeas corpus. It is my hope—and, again, you and I discussed this—that we will structure a Federal review of habeas corpus which will deal fairly but swiftly. I have long been in opposition to the principle of relying on State determinations on full and fair hearing because I believe that it takes longer to decide what is a full and fair hearing than to have the district court make an inquiry on contested facts and have a decision made on that.

My staff and I have checked the backlog in the three biggest death penalty States, or three very big death penalty States—Texas, Florida, and California—and have found that it would require one district judge to hear a capital case on habeas corpus once every 18 months. The bill which we passed in 1989 would set time limits of 120 days for the district court, and limits for the court of appeals and the Supreme Court, as a congressional statement, like the Speedy Trial Act, that those cases ought to receive priority attention.

If the courts need more time, for reasons which they will state for the record, as they do when they differ from the sentencing guidelines, that is understandable, but I believe there ought to be a clear-cut statement of congressional intent that those are priority cases and they ought to be handled within a timeframe unless there are circumstances which require deviation.

If the district court would have the hearing and inquire into all of the facts, I think that that would vastly speed up the process. And then on subsequent petitions, which are always a problem, the proposed legislation called for the court of appeals to be the gatekeeper, so you didn't have repeated district court appeals, but instead went to the court of appeals to make that decision.

With respect to State habeas corpus—and I recall many of those cases—there would be a capital case in the Philadelphia district attorney's office which would go to the State supreme court. The death penalty would be upheld and then habeas corpus would come back down to the trial court and the case would languish there for a very long period of time.

Senator HEFLIN, I will conclude in just a minute.

Senator HEFLIN. I am going to vote. When you get through, you can vote.

Senator SPECTER. OK, and we will hold the hearing, Mr. Chairman, until Senator Cohen returns?

Senator HEFLIN. No; you might miss your vote, so you just have to gamble.

Senator SPECTER [presiding]. Well, I am prepared to gamble. I was just inquiring as to Ms. Harris' status to stay until Senator Cohen comes back.

The State habeas corpus hearings are interminable, and the point that I want to emphasize is my interest in having Federal habeas corpus attach after the first conclusion of the case in the State supreme court, and hopefully to test competency of counsel in a unified appeal on the first round.

Nobody can stop the State courts from entertaining habeas corpus as long as they like and if they want to do that, that is fine, and holding up the death penalty. That is our Federal system. But, it would be my suggestion that the Federal habeas corpus start as soon as the first State conviction is completed and work through as promptly as possible so that the time frame can be established and give a full hearing that also involves adequacy of counsel, which the legislation comprehends.

I just wanted to make those observations and ask for your consideration of that kind of a legislation proposal.

Ms. HARRIS. I will certainly consider it. I mean, it is an intriguing idea, Senator, and I will look at and consider it, I assure you.

Senator SPECTER. OK. We will just recess the hearing for a few moments until Senator Cohen returns, and also the chairman. I know Senator Cohen has some questions.

Ms. HARRIS. Thank you.

Senator SPECTER. Thank you.

[Recess.]

#### OPENING STATEMENT OF SENATOR COHEN

Senator COHEN [presiding]. Such is the seniority system in this committee that someone as junior as myself gets to reconvene this hearing.

I had a couple of questions as I listened to your testimony. You indicated that "if the death penalty were constitutionally sound, I would enforce it." What criteria would you use to determine whether or not it was constitutionally sound?

Ms. HARRIS. Senator, I would rely on the legal experts in the Department of Justice and on the courts for the answer to that.

Senator COHEN. And the Attorney General?

Ms. HARRIS. And the Attorney General, but I think she would probably rely on the law as well.

Senator COHEN. Right; I think she basically articulated the same position as you have that, while personally questioning either the utility or the effectiveness as a deterrent, she nonetheless would feel compelled, obviously, to enforce the law.

I was reading earlier this morning, by chance, an article in the current issue of the New York Magazine, a rather depressing tale of the woes of the city of New York in terms of its crime problem. You indicated you have had experience prosecuting at both the State and the Federal level.

Ms. HARRIS. Actually, I have not prosecuted at the State level.

Senator COHEN. Just at the Federal level?

Ms. HARRIS. Just at the Federal level.

Senator COHEN. I was wondering about your reaction to some of the statistical information that was contained in this article. It said there are roughly 2,000 murders each year in the city of New York, 500,000 reported felonies, 1 million that go unreported; that there were 5,761 violent incidents in public schools; over 1 million guns in circulation, most of them illegal. One out of four robberies in the Nation committed by people 15 or younger are committed in New York City.

There is a growing sense of despair in the city. You have the former mayor, Ed Koch, saying that this city is now in a downward

spiral where middle-class people, black and white, are moving out. We are approaching a point of no return. I dare say that is not unique to New York. I think someone asked him what is the point of no return and he said Detroit. Of course, I think everyone is familiar with what has happened to that city; the people are just rushing to get out.

It is not so unique. We have the same experience right here in Washington, DC, the same level of violence. Certainly, on a per capita basis, it may be even more violent.

What are some of your thoughts about dealing with crime? I know you have focused on white collar crime principally, but what are your thoughts, generally speaking, about how do we deal with the problem of the deterioration of the quality of life where people feel it doesn't make sense anymore?

This starts off with an article about some fellow who was shoplifting in Macy's at 10 in the morning. He was given a DAT, a desk appearance ticket. Three times that day he got three different DAT's. They are called disappearance acts rather than desk appearance tickets. It costs \$70,000 to put a policeman on the streets in New York. Are we going to spend it arresting some shoplifter? Are we going to prosecute him?

What do you see from your own experience that we ought to be doing in the field of criminal enforcement to deal with this kind of a problem? And it is happening nationwide. It is not just New York City.

Ms. HARRIS. Senator, I just so absolutely, utterly agree that the problem of violent crime across this Nation is the single most serious problem we are facing. I think that the drug problem does feed into that. In terms of the problem, I think it is not only, in fact, what is happening out there, but it is our people's perception that it is out of control.

Senator COHEN. Is the perception wrong? I mean, our criminal justice system has become dysfunctional, hasn't it?

Ms. HARRIS. Senator, I don't mean to say that I think it is just a perception, believe me. I have been mugged on the west side of Manhattan, and so I don't mean that at all. But I mean to say that it is as important that we get control and that people believe we are getting control.

In connection with the Criminal Division of the Department of Justice, if confirmed, I mean one of the—in fact, the first thing that—I think I answered someone else—I want to do is to look at the allocation of resources in the Criminal Division right now, asking the single question, what is it that the Federal Criminal Division of the Department of Justice can do to help solve this problem.

We talked about Operation Triggerlock. That is one very practical, very real way that the State authorities and the Federal authorities can work together to try to deal with crime on the streets. Certainly, the crime bill has provisions to put community policing in place on the streets, which I happen to believe is very, very important. I go back to the west side of Manhattan at this point and I think of a crime I read about, oh, maybe last week in the New York Times and it was a deli on Broadway very near my home where community police who knew the community walked by at about 1 in the morning and saw all the lights on, but nobody, and



they knew something was wrong and they knew it because they had worked with those people.

The thing that was wrong was that those people were on the floor of the deli being held there by armed criminals, and the cops saw that and went in and—first, they identified it because they were community police. So I really believe that that community policing concept is very important.

The other thing that I intend, if confirmed, to look into immediately in the Criminal Division is this Nation's drug enforcement efforts because I do connect the drug enforcement problem with the problem of crime in the streets.

Senator COHEN. I want to come back to that in a moment. Tell me, what was your reaction to the sentencing in the Monica Seles case? Just as a person, what was your reaction?

Ms. HARRIS. I will tell you exactly. I saw the headline, I think, in the Post first and then in the Times. I did not read the story. I was getting ready for my hearing. I only recognize that we have a victim now who feels as if the criminal justice system has not really responded to that victim's very personal incident, and that is another area where, if confirmed—as you know, Senator, there is certainly victims rights legislation on the books now. There is more proposed, and I believe that part of solving the problem that I talk about as the perception problem is to make sure that victims feel that the system is responsive.

Senator COHEN. The reason I asked the question is because as you look through the New York Magazine article, you start dealing with the question of how do we come to grips with the decline in quality of life in our urban areas. I would say even rural areas are starting to feel the impact of drug-related or poverty-related types of crimes. It seems that we have lost the connection between acts and consequences or acts and accountability; there is no sense of punishment that awaits anyone.

If you look at what is taking place in our major cities, you can see this, and so the people start to feel a sense of despair, saying, why bother; people are going to go into the system and come out. If you look at Michael Jordan's father's case, you have two young men who were previously incarcerated, one as I recall, for burying an ax in someone's head. He spent about 2½ years in prison for that act. The other young man took, as I recall, a concrete block and tried to bash a woman's head in with it, again spending something like 2 years or less in prison.

The perception is that it is out of control because there are no consequences that really satisfy the public or the social requirement that you not only deter, but that you also punish in order to exact some kind of societal retribution.

It is not just prisons. We have to have more prisons, we have to have more prosecutors, we have to have tougher penalties, and the Seles case just brought it to mind. Then you say we take the violent ones out of society and you put them away for as long as necessary to protect the rest of society, and you then start to deal with the root causes that we all know exist—poverty, lack of opportunity, racism—all those issues that are there that won't go away.

As the article points out, as soon as you start to say I recognize we have got to do the following, but—as soon as you say the word

"but," you have already undercut the notion that there will be consequences to one's actions. It leads me into the question about, for example, minimum mandatory sentences. There is a great reluctance on the part of the courts which, of course, do not like mandatory minimums at all. Many prosecutors, I think, also feel the same way that mandatory minimums takes away discretion, that they contribute to a backlog of cases. Prosecutors can't negotiate or plea-bargain as easily as they might like to do, and it doesn't solve the problem. What are your own thoughts about mandatory sentencing?

Ms. HARRIS. My own thoughts are that—and I guess they are my Attorney General's thoughts as well—that real bad people should go to jail for real long times, and what it takes that is constitutionally valid to do that is something that should be carefully considered and pursued.

Senator COHEN. What about mandatory minimum sentences?

Ms. HARRIS. That certainly is one way to assure that, under certain circumstances, people are going to jail for a long period of time. If those mandatory minimums relate to factors within the crime and the person that says they are real bad and ought to go away for a real long time, then they are effective, I think, and serve the purpose that you want them to serve.

Senator COHEN. I think what gives rise to the desire on the part of legislators to pass such laws is they have lost faith in the courts. Take, for example, the Seles case. I am not familiar with all the details, but what I read is that the court felt that the man was not mentally stable at the time.

The very fact that he stabbed her would be some indication that he was not mentally stable at the time. He didn't intend to kill her. That should come as very small consolation to Ms. Seles, who has not returned to tennis yet. But it raised that whole issue of the courts aren't doing it. Therefore, the lawmakers must do it, and that sets in motion a series of problems on its own that we have to recognize.

Senator Grassley is here, and we call him Senator Qui Tam because he, of course, was the author of many of the 1986 False Claims Act amendments, which I was happy to cosponsor, and then I had my own legislation, the Fraud Civil Remedies Act. There was a reluctance in the past administration toward these types of suits because there was a feeling we shouldn't financially reward whistleblowers. People who work for the Government shouldn't profit by virtue of their service in Government by pointing out fraud.

You talked fairly passionately about white collar crime and instilling a sense of confidence that the law is going to be equally applied. Tell me your own thoughts about these types of false claims suits and whistleblower protection, and how you will go about enforcing them. What kind of approach will you take?

Ms. HARRIS. I have not studied the statutes. I am certainly aware of the general concept of private attorneys general. I, to put it bluntly, will take all the help that we can get. As I say, I haven't studied the statutes, Senator, but I have no problems with that concept.

Clearly, to the extent that you have got criminal investigations going on, civil investigations going on, private investigations going



on, it always complicates litigation, and we know that and that is why we are lawyers at the Department of Justice trying to do the right thing.

Senator COHEN. One of the major areas that you will have to focus on will be health care fraud. The estimates are there is roughly about \$100 billion lost every year to health care fraud, and that is something I think the Attorney General's office and your office, in particular, have to be responsible for.

A final question, Mr. Chairman. Stalking is something that Senator Biden and I and the other members of the committee have been very involved with in the past year. It is a crime that is very insidious. It has gone largely unenforced over the years until recently, and then suddenly because of a spate of cases that have surfaced with some well-known people, about 48 States have passed antistalking laws.

The difficulty is that many of them are so narrow as to be virtually useless, and others are so broad as to be unenforceable because they are unconstitutional. So I authored a bill last year to call upon the National Institute of Justice to develop a model statute so that the States could at least have some confidence that if they were to pattern their own antistalking laws upon it, they could rely upon it with some assurance that it would be constitutional.

That will not satisfy a number of my colleagues, who feel that it is not enough for States to have antistalking laws; they believe we need a Federal statute. I was wondering what your thoughts were about this, not only about this particular type of crime, but what specific criteria you would advocate that we start federalizing crimes that occur on a fairly pervasive basis.

When you go back to the beginning of this country, there were about three categories of crime, and now there are thousands. Are we federalizing too many crimes, and what kind of guidelines would you use to recommend that we use in deliberations whether to create a new Federal statute?

Ms. HARRIS. I think with respect to any of those issues, Senator, it is important to take it on a case-by-case basis. I will be happy to work with you in terms of particular statutes where—I mean, these proposals will not be the first time that there are Federal laws and State laws directed at the same kind of crime. I think that it is important for you to consider whether States are able to enforce their own laws.

I can't be any more specific with you now, but I assure you that it really is an issue that I will take very seriously and I would like to work with you on it.

Senator COHEN. Is it your responsibility to look at this proposed merger between DEA and the FBI? Is that something that will fall on your shoulders?

Ms. HARRIS. Certainly, my lawyers work with FBI agents and DEA agents. The issue that you refer to is an issue that, as you know, the Attorney General is considering right now.

Senator COHEN. Thank you.

I thank the Chair for allowing me to reconvene this hearing. Thank you.



Senator HEFLIN [presiding]. Senator Grassley, do you have questions?

### OPENING STATEMENT OF SENATOR GRASSLEY

Senator GRASSLEY. Yes; thank you, sir.

First of all, congratulations. You are one of the few Assistant Attorneys General that I haven't had an opportunity to visit with in my office. I am sorry I didn't take time to visit with you ahead of time. Congratulations on your appointment.

As Senator Thurmond, I think, indicated to you, I am going to discuss a little bit about child pornography. I may be focusing on something very current that is going on, but I am also interested in a broader approach regarding you as Assistant Attorney General and child pornography, but let me ask this specific point as well.

As you know, Attorney General Reno has continually expressed a concern about the plight of children. In your Criminal Division, you have a section on child pornography and obscenity. I am very concerned with the position that the Department of Justice has taken in the Supreme Court case now on appeal, *Knox v. United States*, that hasn't been argued yet.

In this case, the child pornography user is a repeat offender who owned videos of a scantily-clad 10-year-old girl, and the camera in that video zoomed in on her private parts. The Department obtained a conviction. The court of appeals in a very well-reasoned opinion upheld that conviction. Now, reversing itself, the Justice Department wants to throw out the conviction.

First, it says materials are child pornography only if the child is naked or someone can make out the body parts. Second, it says that the child must engage in lascivious acts rather than being used by the pornographers to produce lascivious reactions.

I sponsored some legislation that followed on the *Ferber* case. We federalized that case in 1985 and 1986 legislation, I think I know something about it. I feel that the Department's position in this case does not reflect congressional intent. We in Congress acted broadly to prohibit these materials.

These pictures have no place in our society. They cannot be produced without causing harm to children. Child pornography has no value, and the Supreme Court has ruled that not only is child pornography not entitled to first amendment protection; even its possession in one's own home can constitutionally be criminalized. By contrast, the Justice Department's position in the *Knox* case creates a safe harbor for smut peddlers to resume the very activities Congress prohibited.

So my question is, Do you know what, if any, input the Criminal Division provided the Solicitor General regarding the position that he is taking now in this *Knox* case?

Ms. HARRIS. Let me say this, Senator—let me say two things. First, just in terms of my stewardship of the Criminal Division if I am confirmed, I share your concern about child pornography. I think it is despicable. We will enforce the child pornography laws.

With respect to the *Knox* case, that decision has been made by the Solicitor General. I personally have not studied the legislative history. The Solicitor General took the position with respect to that specific subsection of the law, and all I can really say is that to the

extent that the child pornography statutes are valid, we will enforce them, and enforce them vigorously.

Senator GRASSLEY. So you don't know specifically what your Division might have recommended, if anything, in this particular case? Maybe your advice wasn't sought. I hope there is a process within Justice where advice from the Solicitor General would be sought in these particular cases. There may be future opportunities in this area of child pornography for your advice to be given to the Solicitor General. Could you tell me what that advice might be in future cases?

Let me say before you answer that, if the Solicitor General's position is upheld by the Supreme Court, it is going to make very, very difficult your prosecution of child pornography cases if you have to prove that the youngster, 6 years old or 16 years old, was acting lasciviously, as opposed to the pornographer's use of this person. But, anyway, please answer the question I gave to you about future cases.

Ms. HARRIS. With respect to future cases, I believe with respect to any statute that any of the sections in the Criminal Division have been assigned to enforce—it is important that the line lawyers and me and my policy people and legislative people and legal people, appellate people, have the chance to be heard.

Senator GRASSLEY. This is a little more specific. Of course, I hope the Supreme Court rejects the Department's new position on child pornography. If it does, will the Criminal Division continue to bring prosecutions in the full range of cases covered by the statutory language, or will it prosecute only those cases that fall within the Department's position in its *Knox* brief?

Ms. HARRIS. My general approach to these things is to follow the law and the facts wherever they take us.

Senator GRASSLEY. So if the Supreme Court does not agree with the Solicitor General, then the brief that was used in that case will not govern your prosecution of cases?

Ms. HARRIS. The law will govern our prosecution of cases.

Senator GRASSLEY. I would like to talk about victims of crime. They are often not treated well enough in our criminal justice system. I think there is also empirical data suggesting that criminals who take greater responsibility for their crimes are less likely to commit future crimes.

The Sentencing Commission has issued a guideline that requires defendants to pay as part of their fine the cost of their imprisonment. The fine is waived if the defendant cannot afford it or if his or her dependents would be unfairly burdened. The money is used to provide restitution, as you know, to crime victims. The courts of appeals are divided on whether the Sentencing Reform Act authorizes the imposition of this fine.

If you are confirmed, would the Criminal Division support legislation that would clarify to Federal judges that they could impose the cost of imprisonment as part of the criminal fine?

Ms. HARRIS. I haven't looked at that issue specifically, Senator, but certainly I will take a look at it. I mean, I assure you that I will.

Senator GRASSLEY. Do you have any particular personal philosophy about that?

Ms. HARRIS. I just haven't really focused my thinking on that question.

Senator GRASSLEY. Why don't I ask you to reflect on it and answer in writing? Could you do that, please?

Ms. HARRIS. Sure, I can do that.

Senator GRASSLEY. I think we will have time. I think you will have time because it will be a week or two before your name comes before the committee.

Ms. HARRIS. Well, let me propose that certainly immediately after consideration, I will get something to you.

Senator GRASSLEY. OK.

[See Questions and Answers following the hearing.]

Senator GRASSLEY. If confirmed, under what circumstances would you allow Federal prosecutors to testify concerning their decisions to prosecute or not prosecute cases?

Ms. HARRIS. I am a line prosecutor. That is where I came from, and you should understand that that is the background that I bring to that question. I believe that the people who make the decisions are the people who should testify or provide information with respect to prosecutorial decisions.

I am very, very concerned about line prosecutors upon whom, at this point, I rely to give me their candid opinion—I am very concerned about the impact on them and the way they exercise their responsibilities to me if they believe they are looking down the road at having to testify about their state of mind and the process through which they went to give me their recommendations.

I believe that I should be accountable for the decisions that I make, and I need their candid information and opinions in order to make my decisions. I am very fearful they will not give it to me if they are concerned about somebody else looking at everything they do.

Senator GRASSLEY. I am going to submit questions in writing because the time of the committee is running short. I am just going to highlight one set of questions because it would follow a little bit upon what Senator Cohen said about my interest in qui tam. The questions don't deal with qui tam, but they will deal with some work of the Defense Procurement Fraud Unit within your Department.

Back under Republican administrations, I felt that they never pursued vigorously defense fraud the way they should and that they were too quick to settle. They seemed not to want to take on the big boys. So my questions relate to how you see that division functioning under your leadership.

Ms. HARRIS. As you know, Senator, if confirmed, that is one issue that I am going to look very hard at, and at that point I will be happy to respond.

[See Questions and Answers following this hearing.]

Senator GRASSLEY. I understand that you spent some time as an employee in my State.

Ms. HARRIS. I certainly did. Not only that, I went to school in your State. I am a graduate of the University of Iowa.

Senator GRASSLEY. Well, congratulations.

Ms. HARRIS. Well, thank you.



Senator GRASSLEY. I suppose that is another factor I will take into consideration.

Ms. HARRIS. By all means.

Senator GRASSLEY. Thank you.

Senator HEFLIN. Thank you. We appreciate your testimony.

Ms. HARRIS. I look forward to working with all of you, Mr. Chairman.

[For Ms. Harris' questionnaire, see Submissions for the Record following this hearing.]

Senator HEFLIN. Now, we will have Mr. Gonzalez, if he will come forward.

Do you have some members of your family or friends that you would like to introduce at your hearing?

### **TESTIMONY OF EDUARDO GONZALEZ, TO BE DIRECTOR OF THE U.S. MARSHALS SERVICE**

Mr. GONZALEZ. Mr. Chairman, I have my lovely wife with me, Marina Gonzalez, and like Ms. Harris, were it not for her support and indulgence, I wouldn't be sitting her today.

Senator HEFLIN. All right, sir. There are many challenges you will face as the Director of the U.S. Marshals Service if you are confirmed. What goals do you intend to establish for the U.S. Marshals Service?

Mr. GONZALEZ. Mr. Chairman, I have a couple of goals in mind, but quite frankly, I would like to, if confirmed, get some input from the staff and the employees at the Marshals Service to perhaps help set goals that would be acceptable to everybody in the organization. I will tell you that I am concerned about courtroom security and perhaps some of the affirmative action issues, and certainly what we are going to be doing about fugitive roundups.

Senator HEFLIN. What areas will be your highest priority as Director of the Marshals Service?

Mr. GONZALEZ. Mr. Chairman, I read the paperwork on the Marshals Service and it indicates that its highest priority is the protection of the judiciary and the judicial system, and I support that position fully. Having to make decisions with respect to lack of funds, I would always opt to protect the system. If we are a nation of law and not of men, we have to have that judiciary working without fear of threat or reprisal.

Senator HEFLIN. You have had 28 years in local law enforcement. Do you think this experience has prepared you to be the Director of the U.S. Marshals Service?

Mr. GONZALEZ. I think it certainly has helped prepare me for it, Mr. Chairman. I have been able to work on the street and in offices and as a leader and as a follower, and I have had opportunity to make mistakes and fall down and get up and try again and I think it is going to be very helpful in directing the Marshals Service.

Senator HEFLIN. In the area of the security of Federal courts and judges, what would you recommend that the courts do to improve security?

Mr. GONZALEZ. Well, there are a couple of areas, Senator. I think the most important one is the necessity to develop a model so that when there are going to be new courtroom or a courtroom expan-

sion that the appropriations for the Marshals Service be taken into account. I am not sure that that is occurring right now.

I also believe we need to expand the closed-circuit TV system that we are doing in Puerto Rico and in Tallahassee right now, which allows us to do hearings without having to move the prisoners from the prisons into the courtrooms. That is going to enhance security quite a bit if we could get that accomplished.

Senator HEFLIN. Protecting judges who are threatened outside the courtroom has also become an area of concern. As we know, Judge Robert Vance was killed by a mail bomb. How would you address these threats against judges?

Mr. GONZALEZ. Mr. Chairman, as I said earlier, the protection of the judiciary and the judges would be the highest priority. Quite frankly, I haven't gotten into all the details of exactly how the Marshals Service operates simply because I don't think it is appropriate until after confirmation.

I can tell you my experience is, especially in Dade County, that whenever there was a threat against a Federal judge, we would get calls from the Marshals Service and we would provide officers to help in the protection on a 24-hour basis.

Senator HEFLIN. You have written articles discussing the Metro Dade Florida Police Department's establishment of a trust fund from revenues generated by liquidation of forfeited assets. Expenditures from this fund have assisted in law enforcement efforts to fight crime. The U.S. Marshals Service is responsible for the management of assets seized by agencies of the Department of Justice. How do you propose to enhance the U.S. Marshals Service's forfeiture capacity?

Mr. GONZALEZ. I think the most important thing for the Marshals Service, Mr. Chairman, is to get on line with the consolidated asset tracking system which is being developed currently. It will be an automated process that will allow us to better account for the properties that are in our custody.

Senator HEFLIN. Another area of responsibility of the U.S. Marshals Service is the pursuit and apprehension of Federal fugitives. It would seem to me that local law enforcement authorities should play a key role in pursuit of Federal fugitives. How will your experience in local law enforcement assist you in coordinating these efforts?

Mr. GONZALEZ. Mr. Chairman, I worked with the U.S. Marshals Service as chief of the court services in Dade County in Operation FIST, and I believe I am going to have the contacts and the knowledge to make sure that local law enforcement works in cooperation with the Marshals Service in future fugitive operations.

Senator HEFLIN. Well, thank you, sir. I appreciate your testimony. I think you had a statement maybe I didn't allow you to read, but if you would, we will make it a part of the record, since this hearing has gone on a little longer than what we had anticipated.

[The prepared statement of Mr. Gonzalez follows:]

#### PREPARED STATEMENT OF EDUARDO GONZALEZ

I have some very brief remarks I would like to make. It is an honor for me to have been selected by the Attorney General and nominated by the President to serve as Director of the United States Marshals Service. It is my opinion, Senators,

that the Marshals Service is the most diverse, dedicated and resourceful of the Federal law enforcement agencies. Its men and women have, since 1789, represented the interest of this Nation with unswerving loyalty and devotion to duty. If confirmed, it will be an honor and a privilege to serve as its Director.

What I bring to the Service, aside from 28 years of law enforcement experience, is my personal belief that the Services' greatest asset is its people. They represent a vast, untapped reservoir of knowledge, experience and ideas that, if allowed to flow, can truly make a difference in how effectively and efficiently we deliver our services. I can assure this committee that, if confirmed, all employees at the Marshals Service will be provided the opportunity to help in creating the shared vision of where the Marshals Service is going and how we are going to get there.

Mr. GONZALEZ. Thank you, Mr. Chairman.

Senator HEFLIN. Thank you.

[For Mr. Gonzalez' questionnaire, see submissions for the record following this hearing.]

Senator HEFLIN. The committee will stand adjourned.

[Whereupon, at 11:53 a.m., the committee was adjourned.]

[Submissions for the record follow:]



## SUBMISSIONS FOR THE RECORD

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### QUESTIONNAIRE FOR NONJUDICIAL NOMINEES United States Senate, Committee on the Judiciary

#### I. BIOGRAPHICAL INFORMATION

1. **Full name (include any former names used).**

Jo Ann Harris (nee Jo Ann Murray)

2. **Address: List current place of residence and office address(es).**

Residence: 202 Riverside Dr., No. 6C, New York, New York 10025; Washington address: 425-8th St. NW, No. 915, Washington, D.C. 20004.

Office address: Special Assistant to the Attorney General, United States Department of Justice, Room 2206, 10th Street & Constitution Ave., Washington, D.C. 20530

3. **Date and place of birth.** May 18, 1933; Macomb, IL.

4. **Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).**

Allen Gregory Harris; retired journalist.

5. **Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.**

University of Iowa, Iowa City, Iowa  
Entered Fall 1951-graduated Summer 1955  
B.A. Magazine Journalism

New York University School of Law  
New York, New York  
Entered Fall 1969-graduated Spring 1972  
Juris Doctor (JD)

JFK School of Government, Harvard University  
Cambridge, Massachusetts  
Attended August 1980  
Certificate, Senior Managers in Government Seminar

6. **Employment Record:** List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.
- 1992-93 Visiting Professor of Law and Director of Trial Advocacy, Pace University School of Law
  - 1992-93 Associate Independent Counsel (part-time), Office of Independent Counsel Arlin Adams
  - 1991-pres Principal, Resolution Resources Corporation (an alternate dispute resolution company)
  - 1990-pres Chairperson, Board of Advisors, Center for the Study of the First Americans, Oregon State University
  - 1990-93 Board Member, Pace University Battered Womens' Justice Center
  - 1990-93 Board Member, New York Council of Defense Attorneys
  - 1983-93 Jo Ann Harris, Attorney at Law (sole practice)
  - 1979-93 Teacher, Team Leader, Program Director, National Institute for Trial Advocacy
  - 1988-92 Lecturer at Law, Harvard Law School
  - 1989-91 Adjunct Professor of Law, New York Law School
  - 1990-91 Assistant Special Deputy Commissioner, City of New York, Department of Investigations, Office of Special Deputy Commissioner Elkan Abramowitz
  - 1984-90 Program Leader and Visiting Professor of Law (1986-87) Emory Law School
  - 1985-86 Non-equity partner, Manton Pennisi Dowd & Harris
  - 1984-86 Adjunct Professor of Law, Fordham Law School
  - 1983-85 Counsel, Schulte Roth & Zabel
  - 1981-83 Senior Litigation Counsel (1981-82) and Executive Assistant United States Attorney (1983), United States Attorney's Office, SDNY

- 1979-81 Chief, Fraud Section, Criminal Division, United States Department of Justice, Washington
- 1974-79 Assistant United States Attorney (1974-78) and Deputy Chief, Criminal Division (1979), United States Attorney's Office, SDNY
- 1972-74 Law Clerk, United States District Judge Lawrence W. Pierce, SDNY
- 1971 (summer) Summer Associate, Paul Weiss Rifkind, et al.
- 1970 (summer) Researcher/writer, Institute for Judicial Administration
- 1960-69 Copywriter, copy chief, creative chief, Time-Life International (advertising promotion), Time Incorporated
- 1956-59 Creative chief, Better Homes & Gardens Idea Annuals (advertising promotion), Meredith Publishing Co.
- 1956 Offset plate maker, Regent Printing Company
- 1955-56 Editorial trainee, Curtis Publishing Co.

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

No service.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

- 1993 Fellow, American College of Trial Lawyers (induction 9/93)
- 1991 Award for "Outstanding Service in the Investigation of Mayor David N. Dinkins," Special Deputy Commissioner, NYC Department of Investigation.
- 1990 NITA Faculty Award for "your inspiration, excellence and dedication for fourteen years of service in teaching advocacy skills at numerous NITA programs."
- 1983 Special Commendation for Outstanding Service in the Criminal Division of the Department of Justice.



- 1972 New York University Founder's Day Award, "Highest bracket of scholastic Preferment recognized by the university" (Juris Doctor, cum laude)
- 1972 Benjamin F. Butler Memorial Prize for "Unusual distinction in scholarship, character and professional activities," New York University Law School.
- 1972 Edmond Cahn Law Review Award for "Greatest contribution to the NYU Law Review by a third-year editor."
- 1972 The Order of the Coif.
- 1970-71, 1971-72 John Norton Pomeroy Scholarship, New York University School of Law.
- 1956-69 Countless printed promotion materials I wrote or supervised won awards in Iowa, New York City, London and Tokyo.
- 1959 Art Directors' Club of Iowa, Award for Illustration.
- 1955 Brewer Torch Press Key, Outstanding Journalism Graduate, University of Iowa at Iowa City.
- 1952-53, 1953-54, 1954-55 Merit Scholarships, University of Iowa at Iowa City

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

- 1974-pres American Bar Association. Criminal Law, Litigation, Legal Education Sections.
- 1978-pres National Institute for Trial Advocacy. For the past 16 years served the National Institute for Trial Advocacy (NITA) as a Program Director, Team Leader and Team Member in a multitude of programs including National Programs, Advanced Courses, Teacher Training Courses and Regional Courses in places as diverse as Berkeley, Ft. Lauderdale, Hempstead, Philadelphia, Minneapolis and Denver.
- 1982-pres Association of the Bar of the City of New York. Committees: Corrections (1982-1985); Criminal Justice Council (1982-1986); Criminal Law (1989-92); Federal Courts (1992-pres); Litigation, Special Training Liaison (1992-pres)
- 1985-pres NY State Bar Assoc. House of Delegates (1985-1986)

1987-pres Federal Bar Council, Second Circuit

1987-91 National Lawyers Guild

1990-93 New York Council of Defense Attorneys (Board of Directors 1990-1993); resigned membership, effective July 31, 1993).

1991-92 Review Panel, Court Appointed Lawyers (18b) for the First Judicial Department, State of New York.

1991-pres Criminal Justice Act Peer Review Committee, United States District Court, S.D.N.Y. (also 1985-1986) (I have sought to be relieved)

10. Other Memberships. List all organizations to which you belong that are active in lobbying before public bodies.

I know of none, although some of the archeological and natural history organizations listed below may do so without notifying members.

Please list all other organizations to which you belong.

1972-pres New York University Alumni Association

1985-pres Smithsonian Associates

1986-pres University of Iowa Alumni Association

1987-pres National Geographic Society

1987-pres Hemlock Farms Community Association

1989-pres American Museum of Natural History

1990-pres Center for the Study of the First Americans

1990-pres Archeological Conservancy

1991-pres National Museum of the American Indian

1990-pres Symphony Space, Inc.

11. Court Admissions: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

1/29/73 State of New York, First Department

12/10/74 United States Court of Appeals for the Second Circuit

12/12/74 United States District Court for the Southern District of New York

12/24/74 United States District Court for the Eastern District of New York

3/5/90 Supreme Court of the United States

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee.

Harris, "Catch (24) - Residual Hearsay," 12 Litigation, No.1, at 10 (Fall 1985)

Harris, "As A Federal Prosecutor: Talking Man-To-Man," Women Lawyers, Perspectives on Success, 149 (Couric ed. 1984)

Harris, "Making and Meeting Objections," Master Advocates Handbook, 191 (Rumsey ed. 1985)

Harris, "A Framework for Pleading Civil RICO," (PLI Civil RICO 1984 at 669; 1985 at 165; 1988 at 145; 1989 at 133)

Harris, "RICO Remedies: Or How To Stop Worrying and Love The Bomb," Second Annual RICO Litigation Seminar Handbook, 61 (Law Journal Seminars Press 1985)

Harris, "RICO Applied To Garden-Variety Fraud By Means Of The Mail and Wire Fraud Statutes," and "Private RICO Actions and the Local Government Plaintiff," RICO Litigation Seminar Handbook (Law Journal Seminars Press 1984)

Harris, " . . . so, you've just learned the grand jury is investigating your Company client and its employees for charging Uncle Sam \$9,999 per toothbrush AND YOU WANT TO COP A CORPORATE PLEA," Superstars of Criminal Defense Seminar, Atlanta, Georgia (1985)



Harris, Monographs on Contempt of Court, Grand Jury Motions, Conflicts of Interest and Multiple Representation, Federal Grand Jury Practice (U.S. Department of Justice, 1982-1983)

Harris, Preindictment Representation of the White Collar Target, Prosecuting and Defending Savings & Loan Bank Fraud Cases, Georgetown University Law Center and ABA Section of Criminal Justice Program, 1992

Report of the Special Deputy Commissioner Concerning the Transfer of Inner City Broadcasting Corporation Stock By David N. Dinkins, The City of New York, Department of Investigation, 1/10/91 (wrote portions, edited all).

Report on the Examination and Review of the Charles Point Resource Recovery Facility Conducted by Special Commissioner Ogden Reid at the Request of the Westchester County Executive, Independent General Counsel, Schulte Roth & Zabel, May 1985 (wrote portions, edited all).

Testimony before the Subcommittee on Oversight of Government Management of the Committee on Governmental Affairs, United States Senate, 97th Cong., 1st Sess.. March 11 and 12, 1981.

Poverty Law-Criminal Trespass-Representatives of Federal and Local Service Organizations Granted Right of Access onto Farmer-Employers Property to Communicate With Migrant Workers - State v. Shack, 58 N.J. 297 (1971). 46 NYU L. Rev. 834 (Oct. 1971).

Military Law - Jurisdiction - Serviceman's Implied Consent To Military Status After Enlistment Term Expired Held Sufficient for Continuing Military Jurisdiction - United States v. Hout, 19 U.S.M.A. 299, 41 C.M.R. 299 (1970). 46 NYU L. Rev. 384 (April 1971).

Question 12 continued. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

I have been a panelist, speaker, lecturer, teacher on white collar crime and the federal law for multitude of professional educational programs sponsored by Practicing Law Institute, Law Journal Press, American Bar Association, other bar associations, universities, business associations, and federal agencies (since 1979). For example, 1992

programs included, among others, the ABA Program "How to Persuade the Jury"; Georgetown University's CLE Program on Banking and Money Laundering Offenses; Law Journal Press Program on Civil and Criminal RICO; and the New York Council of Criminal Defense Attorneys' Program on Federal Sentencing Guidelines.

My participation on these occasions is usually spontaneous, or delivered from notes or other forms of scratches intelligible only to me.

I am enclosing a copy of one speech I made from a prepared text, at the ABA National Convention in New Orleans, August 1981, to the Public Contracts Section, and a newspaper report of the same speech.

13. Health. What is the present state of your health?

Excellent.

List the date of your last physical examination.

2/21/93

14. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed.

- 1992-93 Associate Independent Counsel (part-time),  
Office of Independent Counsel, Arlin Adams.  
Appointed.
- 1990-91 Assistant Special Deputy Commissioner, City of New  
York, Department of Investigations, Office of  
Special Deputy Commissioner Elkan Abramowitz.  
Appointed.
- 1981-83 Senior Litigation Counsel (1981-82) and Executive  
Assistant United States Attorney (1983), United  
States Attorney's Office, SDNY. Appointed.
- 1979-81 Chief, Fraud Section, Criminal Division, United  
States Department of Justice, Washington.  
Appointed.
- 1974-79 Assistant United States Attorney (1974-78) and  
Deputy Chief, Criminal Division (1979), United  
States Attorney's Office, SDNY. Appointed.

1972-74 Law Clerk, United States District Judge Lawrence W. Pierce, SDNY. Appointed.

State (chronologically) any unsuccessful candidacies for elective public office.

None.

15. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

Yes. Lawrence W. Pierce, then-United States District Judge for the Southern District of New York, September 1972 through August 1974. Judge Pierce is now a Senior United States Circuit Judge, Second Circuit Court of Appeals.

2. whether you practiced alone, and if so, the addresses and dates;

Yes. Sole Private Practice of Law, New York, New York, November 1983 through July 1993 (even while employed by other entities, I generally reserved a portion of my time for my sole practice.

M/Yr M/Yr Address of Self-employment

8/92-7/93 78 North Broadway, 203G, White Plains, NY 10603

1/88-7/93 72 Spring Street, New York NY 10012

8/87-12/87 202 Riverside Dr., New York NY 10025

8/86-7/87 Gambrell Hall, Emory campus, Atlanta GA 30322

3/86-7/86 36 W. 44th Street, New York NY 10036

11/83-8/85 900-Third Avenue, New York NY 10022



3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

**Governmental agencies and firms**

- 1/92-6/93 Associate Independent Counsel (part-time), Office of Independent Counsel Arlin Adams, 444 N. Capitol, Washington, D.C 20001 (HUD investigation)
- 3/90-1/91 Assistant Special Deputy Commissioner, NYC Department of Investigations, Department of Investigations, Office of Special Deputy Commissioner Elkan Abramowitz, 530-Fifth Ave., New York, NY 10036 (Dinkins stock transfer and conflict investigation)
- 8/85-2/86 Manton Pennisi Dowd & Harris, 36 E. 44th Street, New York, NY 10036 (non-equity partner)
- 12/84-5/85 Associate Independent General Counsel to Special Commissioner, Westchester County Executives' Office, White Plains, NY (investigated and reported upon allegations of conflict of interest). The Independent Counsel was Schulte Roth & Zabel by John S. Martin, Jr. (now a federal judge on the S.D.N.Y. bench).
- 11/83-8/85 Schulte Roth & Zabel, 900-Third Avenue, New York, NY 10022 (of counsel to law firm)
- 12/81-10/83 United States Attorneys Office, Southern District of New York, One St. Andrews Plaza, New York, NY 10007
- 1/83-10/83. Executive Assistant United States Attorney (at the time, the third highest ranking position in the office). Responsible for trial of major criminal and civil cases; and for assisting United States Attorney in management,

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<sup>1</sup> I am assuming this question is limited to my legal career which began when I entered law school in the Fall of 1969. I had a career in publishing before I went to law school and worked for a number of companies: Curtis Publishing Company (1955-56), Meredith Publishing Company (1956-60) and Time Inc. (1960-69)

supervision and training of staff, and formulation and execution of office policy.

**12/81-12/82.** Senior Litigation Counsel. Responsible for trial of major criminal and civil cases; and for training Assistant United States Attorneys throughout the country.

**11/79-11/81** Chief, Fraud Section, Criminal Division, Department of Justice, Wash., D.C. 20530

Responsible for operations and management of largest litigating section located in Department of Justice Criminal Division headquarters. Fraud Section investigates and prosecutes complex major white collar crimes in federal districts throughout the country.

**9/74-10/79** United States Attorneys Office, Southern District of New York New York, NY 10007

**10/78-11/79.** Deputy Chief, Criminal Division. Responsible for supervision of day-to-day activities of Criminal Division Assistant United States Attorneys and federal agents throughout the district.

**9/74-10/78.** Assistant United States Attorney. Investigated, tried to juries, briefed and argued appeals in a multitude of criminal cases, ranging from bank robbery to securities fraud and government fraud matters.

**8/72-8/74** Law Clerk to Hon. Lawrence W. Pierce, then-United States District Judge, Southern District of New York, United States Courthouse, New York, NY 10007

**1972 (summer)** Paul, Weiss Rifkind, et al, 1285 Avenue of the Americas, New York, NY 10019 (summer associate while in law school)

**1971 (summer)** Institute for Judicial Administration, New York University Law School, Washington Square South, New York, NY 10012 (researcher/writer, Maine Court Study).

# Law Schools and Other Teaching Organizations

- 8/92-8/93 Pace University Law School, White Plains, New York, Visiting Professor, Director of Trial Advocacy, charged with the creation and execution of a simulated skills training program for law students, incorporating procedural and substantive areas of the law.
- 8/92-8/93 Team Leader, Pace Battered Womens' Justice Center Advocacy Program, training young lawyers how to represent victims of family violence in family court.
- 8/86-8/87 Emory Law School, Atlanta, Georgia, Visiting Professor of Law. Teaching Evidence, Trial Techniques, Advanced Litigation, and Contempt of Court.
- 8/79-pres National Institute for Trial Advocacy, Program Director, Team Leader and Team Member in a multitude of programs including National Programs, Advanced Courses, Teacher Training Courses and Regional Courses.
- 1982-1990 Emory Law School. Program Leader and Adjunct Professor of Law.
- 1984-1986 Fordham Law School. Adjunct Professor of Law.
- 1977-1992 Harvard Law School. Team Leader and Harvard Lecturer (1988-92); Teaching Teams (1977; 1978; 1981-1983; 1991)
- 1977-1982 Hofstra Law School: Teaching Teams.
- 1990-1991 New York Law School: Adjunct Professor of Law.
- 1992 Pace University School of Law: Adjunct Professor of Law.



- b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

I have always tried to keep my practice divided into three areas:

- 1) representing white collar professionals in connection with federal criminal and administrative matters (grand jury investigations, agency inquiries, trials);
- 2) teaching and mentoring law students and young lawyers; and
- 3) representing indigent people, some entirely pro bono (such as representation of battered women) and some at a reduced rate (such as assigned cases under the Criminal Justice Act in federal court).

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

New York based national practice. Specializing in advocacy for people and companies in connection with federal inquiries, from administrative proceedings to grand jury investigations to trial in white collar cases including tax, securities, anti-trust, and fraud by and against business.

Typical clients in the fee-producing third of my practice ranged from an ex-Savings and Loan president, to an elderly woman accused of grocery coupon fraud, to bank employees accused of money laundering, to antique dealers and an armored car company investigated for anti-trust violations, to employees of exchanges and brokerage firms and trading firms, to a woman whose husband is in the Witness Protection program, to businessmen accused of customs fraud, to a number of individuals involved in tax fraud and securities fraud investigations, to labor leaders.

My CJA clients ranged from people accused of drug dealing, to money laundering, to corruption, to racketeering. Although I have virtually no state court practice, in the Bronx Supreme Court, I have represented a battered woman accused of murdering her abuser; and I have worked with a group of lawyers who represent battered women pro bono.

- c. 1. Did you appear in court frequently, occasionally, or not at all?
- 1974-79 Frequently. As an Assistant United States Attorney charged with prosecuting federal criminal cases, trying and supervising the trial of such cases, and any appeals resulting from the trials.
- 1979-81 Not at all. Managing the DOJ Fraud Section.
- 1981-83 Two major cases. One was a three month trial; the other required frequent court appearances over a six month period.
- 1983-93 Frequently on CJA cases. Less frequently on fee-producing cases because they tend -- with some exceptions -- to involve grand jury investigations and advocacy before various agencies.
2. What percentage of these appearances was in:
- (a) federal courts: 99%
- (b) state courts of record: 1%
- (c) other courts: 0%
3. What percentage of your litigation was:
- (a) civil: 5%
- (b) criminal: 95%
4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.
- Approx 31; sole counsel - 14; chief counsel - 2; co-counsel - 1; training counsel - 12; and junior counsel - 2.
5. What percentage of these trials was:
- (a) jury: 95%
- (b) non-jury: 5%

16. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

- (a) the date of representation;
- (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
- (c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

(1) United States v. DiSomma, 951 F. 2d 494 (2d Cir. 1991), aff'g, 769 F. Supp. 575 (S.D.N.Y. 1991).

From May 1991 through July 1993 I represented Joseph DiSomma after he was convicted of a single Hobbs Act conspiracy violation. In postconviction litigation, Judge Miriam Goldman Cedarbaum, USDJ, SDNY, was persuaded to apply a relief clause in the new Bail Reform Act to permit release of DiSomma on bail pending appeal. The government appealed the bail ruling, and lost. The case was the first interpreting the new statute and established important precedent.<sup>2</sup>

James B. Comey, Assistant United States Attorney in charge of the case. United States Attorney's Office, One St. Andrews Plaza, New York, NY 10012. (212) 791-1134. (Mr. Comey is now in private practice with McGuire, Woods, Battle & Boothe, 901 East Cary Street, Richmond, VA 23219 (804) 775-1000.

(2) United States v. Michael Pugliese, Dkt. No. SS90 Cr. 428 (MGC) (S.D.N.Y. 1990).

From July 1990 to May 1991. I was assigned pursuant to the CJA to represent Mr. Pugliese after his arrest on a RICO conspiracy charge arising out of events seven years old. Trial commenced March 3, 1991 before Judge Miriam Goldman Cedarbaum and lasted about three months. My client was acquitted. I drafted an important jury charge on the statute of limitations in RICO conspiracy cases which was accepted and used by the trial judge.

James B. Comey was the Assistant United States Attorney in charge of the case. See DiSomma, supra.

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<sup>2</sup> The Second Circuit later affirmed the conviction in the main appeal.



**Defense counsel:**

Alfred F. Brown, Esq.  
60 Park Place  
Suite 1701  
Newark, NJ 07102  
(201) 643-8098

Lawrence Carra, Esq.  
114 Old Country Road  
Mineola, NY 11501  
(516) 742-1135

Harriet B. Rosen  
Attorney at Law  
240 West 23rd Street  
New York, NY 10011  
(212) 366-6166

Anthony L. Ricco  
Ricco & Villane  
361 Broadway  
New York, NY 10013  
(212) 219-0100

Jack Evseroff  
186 Joralemon Street  
Brooklyn, NY 11201  
(718) 875-0903

Howard Mulholland  
84-74 Talbot Avenue, #1E  
Kew Gardens, NY 11415  
(718) 846-7162

(3) United States v. John Long and John Mahoney, 917 F. 2d 691 (2d Cir. 1990).

Commencing in the Winter of 1988, I undertook the representation of John Mahoney in this labor racketeering indictment. After a two month trial in the late Fall of 1988, Mr. Mahoney was convicted. Over my specific objection, Judge David N. Edelstein had charged the jury in error with respect to necessary elements of the crime. The Second Circuit reversed on this ground; the United States Attorney's office did not retry the case.

Co-counsel: Michael G. Dowd Director of the Pace University's Battered Women's Justice Center, 78 North Broadway, White Plains, NY 10603, (914) 422-4069

Joan McPhee and Frances Fragos were the Assistant United States Attorneys in charge of the case. I do not know where Ms. McPhee is; Frances Fragos is still an AUSA, One St. Andrews' Plaza, New York, NY 10007. (212) 791-1162.

(4) United States v. National Mortgage Bank of Greece, et al., 90 Cr. 201 (S) (RJD) (E.D.N.Y.)

From the time of the arrests of some 20 employees of the National Mortgage Bank of Greece in June, 1989 through July 1993, I represented two employees who were charged with money laundering and other offenses, and have made, I believe, a valuable contribution to the resolution of the case which meant millions of dollars recovered by the United States, while minimizing the charges brought against low-level bank employees. Judge Raymond Dearie was the United States District Judge who presided over the case.

**Defense attorneys:**

Harold R. Tyler, Jr.  
Patterson, Belknap, Webb & Tyler  
30 Rockefeller Plaza  
New York, NY 10112  
(212) 698-2500

Frederick Davis  
Sherman & Sterling  
153 E. 53rd  
Room 3316  
New York, NY 10022  
(212) 848-4675

John Rogers Carroll  
615 Chestnut Street  
Suite 1206  
Philadelphia, PA 19106  
(215) 925-4100

Peter Schlam  
Schlam Stone & Dolan  
26 Broadway  
New York, NY 10004  
(212) 344-5400

Arthur J. Viviani  
123 William Street  
New York, NY  
(212) 349-8205

Charles E. Clayman  
 Clayman & Gallop  
 Gallop, Dawson & Clayman  
 305 Madison Avenue  
 New York, New York  
 (212) 922-1080

Peter Kirchheimer  
 Federal Defender Unit  
 50 Court Street  
 Brooklyn, NY 11201  
 (718) 330-1206

Craig Kaplan  
 Levinson & Kaplan  
 220-Fifth Avenue  
 New York, NY 10001  
 (212) 679-4488

Archie D. Typadis  
 One Financial Center  
 Suite 1305  
 Boston, MA 02111  
 (617) 348-3845

Harry C. Mezer  
 89 Broad Street  
 14th Floor  
 Boston, MA 02111  
 (617) 482-7777

Alan Kaufman  
 Buchwald & Kaufman  
 600 Third Avenue  
 New York, NY 10016  
 (212) 661-0040

Alan Mansfield  
 Phillips Nizer  
 40 West 57th Street  
 New York, NY 10019  
 (212) 977-9700

Pamela Rogers Chepiga  
 Cadwalader, Wickersham & Taft  
 100 Maiden Lane  
 New York, NY 10038  
 (212) 504-6626



The Assistant United States Attorneys on the case were:

Mary Jo White, at the time Chief Assistant in the  
EDNY (now United States Attorney in the SDNY [212-  
791-0055]);

Andrew Luger and Keith Krakauer, United States  
Attorneys Office, United State Court House  
Camden Plaza East  
Brooklyn, NY 11201  
(718) 330-2157

(5) United States v. Mary Taylor, 92 Cr. 322  
(CSH) (S.D.N.Y.).

From December 1991 through July 1993, I represented Mrs. Taylor (CJA assignment) in a case involving the prosecution by federal authorities of a number of employees of the New York State Department of Motor Vehicles. Through this representation, I have done significant work on formulating the factual and legal predicate for the admission of expert testimony on the battered womens' syndrome in federal criminal cases to explain conduct. Trial Judge Charles S. Haight ruled against me on the issue; a plea agreement which I regarded as fair and favorable to Ms. Taylor followed.

Jonathan Halpern is the Assistant United States  
Attorney on the case. United States Attorneys Office,  
One St. Andrews Plaza, New York, NY 10007 (212) 791-  
0042.

(6) United States v. Deborah Gore Dean, CR 92-181-  
GAG (D.D.C.)

From approximately January 1992 through June 1993 I served as Associate Independent Counsel on the staff of Independent Counsel Arlin Adams, in charge of trial and trial preparation in the prosecution of this high level ex-HUD official. In the course of my duties I also led the drafting team for the superseding indictment and consulted on legal issues for the pretrial appeal taken by OIC from a pretrial ruling by Judge Gerhard Gesell relating to important issues concerning government documents. I led a team of several lawyers, paralegals, and FBI, IRS and HUD agents during my tenure.

Ms. Dean's lawyers are:

Stephen J. Wehner, Esq.  
513 Capitol Court NE  
Suite 200  
Washington, D. C. 20002  
(202) 543-2700.

Donald E. Santarelli, Esq.  
1155 Connecticut Avenue NW  
Washington, D. C. 20036  
(202) 466-6800

My colleagues were: Associate Independent Counsel  
Paula Sweeney and Bruce Swartz, (202) 786-6681

(7) People v. Iris Moore, Dkt. No. 4055/87, Bronx County  
Supreme Court (Justice Nicholas Figuora) (1987).

From approximately November 1987 through the Fall of  
1988 I represented, pro bono, a grandmother who had suffered  
emotional, sexual and other physical abuse from the men in her  
life from the time she was a small child. She had killed the man  
living with her. My defense of this remarkable woman literally  
returned control of her world to her. She is working and  
confident in the future.

The Bronx prosecutor was Lynda Viti (Venezia)  
Bronx County District Attorney's Office  
Grand Concourse, Bronx, NY (212) 590-2195

(8) Sierra Club v. Corp of Engineers, 776 F. 2d 383 (2d  
Cir. 1985), cert. denied, 475 U.S. 1084 (1986). <sup>3</sup>

From approximately May 1983 through November 1983, I  
was in charge of the United States Attorney's representation of  
the United States Army Corp of Engineers in connection with the  
Westway litigation before Judge Thomas P. Griesa. At the time,  
the Westway litigation was one of the most significant -- and  
troubled -- environmental litigations in the nation, involving a  
dispute between local, federal and state government agencies and  
environmental groups about plans to run a super highway up the  
Westside of Manhattan. I was assigned to the case when  
allegations of contempt of court were lodged against the Corp of  
Engineers and its colonel, and significant conflict of interest  
issues arose with respect to the activities of the same colonel.

(9) United States v. Sun Myung Moon, 718 F. 2d 1210 (2d  
Cir. 1983), cert. denied, 466 U.S. 971 (1984).

From approximately January 1982 through October 1983 I  
lead the prosecution team in the prosecution of Sun Myung Moon on  
obstruction of justice and tax charges. When I came into the  
case as senior government trial lawyer, the matter was already  
indicted and trial was pending before Judge Gerard L. Goettel.

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<sup>3</sup> This was the last in a series of Second Circuit  
decisions relating to this case. My responsibilities did not  
include any of the appellate work.

After the convictions, I represented the government in post-trial matters, was the lead writer on the appellate brief and successfully argued the appeal in the Second Circuit.

**Defense attorneys:**

Charles A. Stillman (Moon's trial lawyer)  
Stillman, Friedman and Shaw  
425 Park Avenue  
New York, NY 10022  
(212) 223-0200.

Andrew Lawler (Kamiyama's lawyer)  
220 East 42nd Street  
New York, NY 10017  
(212) 687-8850

Prof. Laurence W. Tribe (Moon's post-trial and appellate lawyer)  
Harvard Law School  
Griswold Building  
Cambridge, MA 02138

**(10) Benchmark government program fraud cases:**

United States v. Sylvan Sacolick and Nicholas Rizzi, 76 Cr. 1000 (GLG), aff'd, Dkt. No. 77-1420 (2d Cir. 1977).

During 1975 and 1976, I was in charge of the investigation, trial and appeal from conviction in this major medicaid fraud case in the Southern District of New York. The case involved the double and triple billing of the federal government for drugs and services supplied to drug addicts. It was one of the first cases using computer programs and computer search techniques to identify and to prove the fraud. The work was done by a specially assembled team of Postal Inspectors, personnel from the City Health Department's Fraud Unit and the Audit Branch of the federal agency disbursing the funds (HEW).

United States v. Harold Lane, 76 Cr. 879 (CSH), aff'd, Dkt. No. 77-1226 (2d Cir. 1977).

During 1976, I was in charge of the investigation, trial and appeal from conviction in this major food stamp fraud case in the Southern District of New York. The case involved the exploitation of weaknesses in the remitting system through the Federal Reserve Bank and included one of the only genuine net worth tax cases tried in the district. I led a team of Agriculture Agents, Postal Inspectors and IRS Criminal investigators and Revenue Agents.



17. Legal Activities. Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived).

As a senior public official responsible for managing people, issues, criminal justice policies and complex criminal cases.

I have served the Department of Justice, both in the United States Attorney's Office for the Southern District of New York and as Chief of the Criminal Division's Fraud Section in Washington, not only as a trial lawyer, but as a manager of federal lawyers and agents, and of the issues and policies underlying federal law enforcement efforts on multiple fronts.

In this connection, my activities have been dedicated to a single goal in the public interest: To do the right thing; to take the awesome power of a federal prosecutor, and to use it to its full extent -- and not a millimeter beyond -- to combat criminal activity which impacts on the citizens of our country.

As Deputy Chief of the Criminal Division of the United States Attorneys Office in the Southern District of New York, I assisted in the supervision of all of the 90-some Assistant United States Attorneys in the Office, but with particular attention to new AUSAs. I focussed on the development of high ethical standards and superior trial skills. In addition, I dealt with hundreds of law enforcement agents in the District, evaluating their cases, guiding their investigations, helping them to shape triable cases and to exercise sound judgment.

I brought to the job as Chief of the Fraud Section for the Department's Criminal Division my considerable experience, interest and focus on the development of unified federal enforcement teams against complex white collar crime, the training of law enforcement people, and the fair exercise of prosecutorial discretion. In the process I managed an organization of some 80 lawyers, plus agents and paralegals and staff. In so doing, I developed the skills necessary to handle the administrative issues related to such an organization; and I enhanced my understanding of the organization's relationship to the Criminal Division, the Offices of the United States Attorneys, and other federal agencies.

When I returned to the United States Attorney's Office for the Southern District of New York, I was assigned to the trial of major cases, with a specific responsibility for training young AUSAs in New York and elsewhere; but also, as Executive

Assistant United States Attorney, I became responsible for the civil side of the office as well as the criminal side, and thereby garnered valuable insight into the effective use of civil sanctions against white collar illicit conduct.

**As a teacher:**

As a teacher of advocacy to literally thousands of young lawyers in this country for the past 16 years, I have done my level best to set an example of an attorney and counsellor at law who is honest, fair, hard-working and absolutely dedicated to my client's interest, whether that client is the government or an individual in trouble. I like to think that by word and deed I have succeeded.

**II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)**

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

I was a sole practitioner whose clients were mainly individuals. I charged an hourly rate, and billed only for hours I worked for the client, plus expenses. I have earned no income after July 31, 1993, but expect to continue to receive fees for work done prior to that cut-off date. Receivables total some \$ 70,000.

I have an investment of \$5,000 in Resolution Resources Corporation, a small Atlanta-based alternative dispute resolution company. I do not anticipate receiving any compensation from this company which is operating at a loss.

I have a personal Pension Fund (501k) valued at about \$350,000 funded entirely by deferred earnings from my law practice. The assets in the Fund are fully disclosed in my Financial Disclosure Form, and consist, in the main, of annuities. This fund will continue to appreciate in value.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

I will seek the advice of appropriate Department of Justice ethics officials about my participation in any matter involving former clients or investigations in which I have been involved as a defense attorney, or in any matter in which I may have a financial interest. I will recuse myself where necessary.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service in the position to which you have been nominated?

No.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

See enclosed Financial Disclosure Report.

5. Please complete the attached financial net worth statement in detail.

See enclosed Financial Net Worth Statement.

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

I rang doorbells for Adlai Stevenson in Des Moines, Iowa, in 1956. Role: rank volunteer.



## III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

From 1969, when I first entered law school, I have taken very seriously my obligation as a lawyer and counsellor at law to serve the disadvantaged in our society.

A. In my last year of law school I declined the opportunity to be Articles Editor of the New York University Law Review in order to dedicate my time to the New York University Criminal Justice Clinic. My work with the clinic involved not only work in the Criminal Courts under Legal Aid supervision, but also legal counselling run-away kids two nights a week at The Door (a nonprofit drop-in center providing legal and medical services). I also spent one day a week, providing legal counselling to the inmates of the Bernstein Heroin Detoxification Unit of Beth Israel Hospital.

B. I firmly believe that my years with the Department of Justice were also in the service of the disadvantaged in the sense that I sought to exercise the vast power of a federal prosecutor to provide a fair, straight, sound, clear lens through which our community (victims, jurors, witnesses, lawyers and, yes, defendants) judged its criminal justice system.

C. After I left government in 1983, I made a deliberate decision to split my law practice into three components:

- 1) Representing the disadvantaged; <sup>4</sup>

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<sup>4</sup> I believe that federal judges and federal prosecutors and federal defenders in the Southern District of New York will attest that I have energetically, ethically and skillfully represented dozens and dozens of indigent people assigned to me for CJA representation. Indeed, my background has well suited me to manage a very focussed defense for each one of these clients.

2) Imparting to young lawyers the skills, the enthusiasm, the character to serve their communities as counsellors, and to be proud of being a lawyer;<sup>5</sup>

3) ... and -- to support the two activities cited above -- representation of white collar professionals involved in federal investigations and proceedings, at a healthy hourly rate.

Through the ten years that I have been in private practice, I am proud to say that I have maintained that balance.

2. Do you currently belong, or have you belonged, to any organization which discriminates on the basis of race, sex, or religion -- through either formal membership requirements or the practical implementation of membership policies?

No.

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<sup>5</sup> In addition, I have been very active in working with colleagues who specialize in defending battered women and formulating policy designed to prevent and deal with the consequences of family violence, and have served as a volunteer team leader and teacher for the Pace University Battered Womens' Justice Center Advocacy Program, training young lawyers how to represent victims of family violence in family court. Also, in connection with the thousands of volunteer teaching hours, I have helped train teachers for legal services and legal aid organizations.

## FINANCIAL STATEMENT

## NET WORTH

JO ANN HARRIS

July 31, 1993

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of our household.

ASSETS		LIABILITIES	
Cash on hand and in banks	27,000	Notes payable to banks—secured	
U.S. Government securities—add schedule		Notes payable to banks—unsecured	
Listed securities—add schedule	80,249	Notes payable to relatives	
Unlisted securities—add schedule	5,000	Notes payable to others	
Accounts and notes receivable:		Accounts and bills due	5,000
Due from relatives and friends		Unpaid income tax	
Due from others	40,000	Other unpaid tax and interest	
Doubtful	30,000	Real estate mortgages payable—add schedule	90,000
Real estate owned—add schedule	120,000	Chattel mortgages and other liens payable	
Real estate mortgages receivable		Other debts—itemize:	
Autos and other personal property	25,000		
Cash value—life insurance			
Other assets—itemize:			
Jo Ann Harris Pension P.	371,633		
Jo Ann Harris IRA	5,663		
Jo Ann Harris IRA	12,000	Total liabilities	95,000
TFEA (CREF)	7,853	Net worth	629,598
Total assets	724,598	Total liabilities and net worth	724,598
CONTINGENT LIABILITIES		GENERAL INFORMATION	
As endorser, cosigner or guarantor	No	Are any assets pledged? (Add schedule.)	No
On leases or contracts	No	Are you defendant in any suits or legal actions?	No
Legal Claims	No	Have you ever taken bankruptcy?	No
Provision for Federal Income Tax	12,000		
Other special debt	No		

Signed



## ABR TAX SERVICE, INC.

ONE TIMES SQUARE  
SUITE 718  
NEW YORK, NY 10036

TEL: (212) 600-2010  
FAX: (212) 600-1163

FINANCIAL STATEMENT  
NET WORTH  
JO ANN HARRIS  
July 31, 1993

SCHEDULES

## Listed Securities:

Prudential Bache Tax Free Bonds	\$64,018.00
Prudential Bache Municipal NY-MM	<u>16,231.00</u>
	<u>\$80,249.00</u>

## Unlisted Securities:

Resolutions Resources Corp.	<u>\$ 5,000.00</u>
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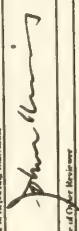
## Real Estate Mortgages payable:

Mid Coast Mortgage Co.	<u>\$90,000.00</u>
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## Real Estate owned:

Residence - Pennsylvania	<u>\$120,000.00</u>
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# Executive Branch PUBLIC FINANCIAL DISCLOSURE REPORT

<b>Reporting Status</b> <input type="checkbox"/> New Appointment <input checked="" type="checkbox"/> Reappointment		<b>Calendar Year Covered by Report</b> <input checked="" type="checkbox"/> New Estimate, Nomination, or Reappointment <input type="checkbox"/> Termination		<b>Termination Date (If Applicable)</b> Month/Day/Year	
<b>Reporting Individual's Name</b> Last Name: Harris First Name and Middle Initial: Jo Ann		<b>Department or Agency (If Applicable)</b> Department of Justice			
<b>Position for Which Filing</b> Assistant Attorney General		<b>Department of Justice</b> Telephone No. (Include Area Code) (914) 422-4405			
<b>Location of Present Office</b> (For e-mailing address) Address (Number, Street, City, State, and ZIP Code) Pace Univ. Law School, 78 N. Broadway, Room 203G, White Plains, New York 10603		<b>Title of Position</b> Associate Independent Counsel (HUD) (1/92-6/93)			
<b>Predecessor's Name</b> CJA Panel, SDNY		<b>Is This Individual a Qualified Former Trustee?</b> <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No			
<b>Certification</b> I, the undersigned, being the undersigned, have made on this form and all attached schedules are true, complete and correct to the best of my knowledge and belief.		<b>Signature of Reporting Individual</b> 			
<b>Other Reporting</b> (If desired by agency)		<b>Signature of Other Reporting</b> Date (Month, Day, Year) 6/24/93			
<b>Agency Ethics Officer's Opinion</b> The information contained in this report discloses no conflict of interest under applicable law and regulations.		<b>Signature of Designated Agency Ethics Officer/Officer-in-Charge</b> Date (Month, Day, Year)			
<b>Office of Government Ethics Use Only</b>		<b>Signature</b> Date (Month, Day, Year)			

Comments of the reporting officials (if additional space is required, use the reverse side of this sheet)

**Fee for Late Filing**  
Any individual who is required to file this report and does so more than 30 days after the date for filing is required to be assessed a late filing fee of \$200. The late filing fee shall be assessed on the last day of the filing extension period and shall be subject to a \$200 fee.

**Reporting Periods**  
Incumbents: The reporting period is the period beginning on the date of the filing of the report and ending on the date of the filing of the report. Part II of Schedule C and Part I of Schedule D where you must also include the filing year up to the date you file. Part II of Schedule I is not applicable.

**Termination Filers:** The reporting period begins at the end of the period covered by your previous filing and ends at the date of termination. Part II of Schedule D is not applicable.

**Nominees, New Entrants and Vice Presidents:**

**Schedule A:** The reporting period for income (BLOCK C) is the preceding calendar year and the current calendar year up to the date of filing. Value assets as of any date you choose that is within 31 days of the date of filing.

**Schedule B:** Not applicable.

**Schedule C: Part I (Liabilities):** The reporting period is the preceding calendar year and the current calendar year up to any date you choose that is within 31 days of the date of filing.

**Schedule C: Part II (Agreements or Arrangements):** Show any agreements or arrangements as of the date of filing.

**Schedule D:** The reporting period is the preceding calendar year and the current calendar year up to the date of filing.





Harris, Jo Ann

**SCHEDULE B**  
 New Estates/Nominee/Candidate  
 Schedule Not Applicable

Page Number

3

**Part I: Transactions**

Report any purchase, sale, or exchange by you, your spouse, or dependent child during the reporting period of any real property, stocks, bonds, commodity futures, and other securities when the amount of the transaction exceeds \$1,000. Include transactions that resulted in a loss. Do not report a transaction involving property used solely as your personal residence or a transaction solely between you, your spouse, or dependent child. Check the "Certificate of divestiture" block to indicate sales made pursuant to a certificate of divestiture from OGE.

Identification of Assets

Example Central Airlines Common

Transaction Type (1)	Date (Mo., Day, Yr.)	Amount of Transaction (2)	Divestiture of Certificate of Divestiture (3)
1	3/7/91	100.00	100.00
2			
3			
4			
5			
6			

**Part II: Gifts, Reimbursements, and Travel Expenses**

Report the source, a brief description (including travel, dates, and the nature of expenses provided), and the value of: (1) transportation, lodging, food, or entertainment received from one source totaling \$250 or more (unless received as personal hospitality at the donor's personal or family residence); (2) other gifts from one source totaling \$100 or more in value; and (3) cash reimbursements of \$250 or more from one source. Exclude gifts, reimbursements and travel expenses from the U.S. Government. Also exclude gifts from relatives, gifts of \$75 or less when aggregating gifts for the total from one source, and gifts and reimbursements received by your spouse or dependent child that were given totally independent of the relationship to you. See instructions for further exclusions.

Source (Name and Address)	Brief Description	Value
Example: Mrs. Ann. of Mark Collections, NY, NY	Antique watch, hand from B. watch incident to national conference 6/16/90	\$600
Mrs. Ann. of Mark Collections, NY, NY	Leather briefcase for visiting president	\$125
1		
2		
3		
4		
5		



FD-278 (Rev. 10-71)  
U.S. GOVERNMENT PRINTING OFFICE: 1971

U.S. GOVERNMENT PRINTING OFFICE: 1971

Reporting Individual's Name		Page Number			
Harris, Jo Ann		5			
<p><b>SCHEDULE D</b></p> <p><b>Part I: Positions Held Outside U.S. Government</b></p> <p>Report all positions held during the applicable reporting period, whether compensated or not. Positions include but are not limited to those of an officer, director, trustee, general partner, proprietor, representative, employee, or consultant of any corporation, firm, partnership, or other business enterprise or any non-profit organization or educational institution. Exclude positions with religious, social, fraternal, or political entities and those solely of an honorary nature.</p> <p>None <input type="checkbox"/></p>					
Examples	Organization (Name and Address)	Type of Organization	Position Held	From (Mo., Yr.)	To (Mo., Yr.)
	Not known of Jack Calloway, NY, NY	Non-profit, education	President	1985	1986
	The Johns & Smith, Baltimore, USA	Law firm	Partner		
1	Jo Ann Harris, Attorney at Law	Law Practice	Sole owner	11/83	pres.
2	Pace University School of Law	University	Adjunct prof	1/92	5/92
3	Harvard Law School	University	Visiting Prof	8/92	pres
4	Center for Study of First Americans	Non-profit educational	Lecturer in Law	1988, 1989	pres
5	Oregon State University	Non-profit educational	Board of Advisors	1990	pres
6	National Institute for Trial Advocacy	Non-profit educational	Teacher, Leader	1979	pres
7	SEE ADDENDUM				
<p><b>Part II: Compensation In Excess Of \$5,000 Paid by One Source</b></p> <p>Report sources of more than \$5,000 compensation received by you or your business affiliation for services provided directly by you during the reporting period. This includes the names of clients and customers of any corporation, firm, partnership, or other business enterprise, or any non-profit organization when you directly provided the services generating a fee or payment of more than \$5,000. You need not report the U.S. Government as a source.</p> <p>Incumbent/Termination Plan? <input type="checkbox"/> Candidate: <input type="checkbox"/> Not Applicable <input type="checkbox"/></p> <p>None <input type="checkbox"/></p>					
Source (Name and Address)	Brief Description of Duties				
Examples: The Johns & Smith, Baltimore, USA	Legal services				
McLure University (client of The Johns & Smith, Baltimore, USA)	Legal services in connection with university construction				
SEE ADDENDUM					



## CONTINUATION - SCHEDULE A

JO ANN HARRIS - 7/31/93 for  
Calendar Year 1992 and 1993 to  
6/1/93.Assets and Income

Block A	Block B Value	Block C Type	Amount
<u>Assets</u>			
6. Bank accounts (Chase Manhattan Bank)			
Business Account	15,000-50,000	Interest	1,000- 2,500
Money Market	50,000-100,000	Interest	1,000- 2,500
Personal	1,000-15,000	Interest	201-1,000
Personal Money Market	0	Interest	0
7. IRA - Chase Manhattan Certificates of Deposit	1,000-15,000	Interest	1,000- 2,500
8. Spouse IRA - Chase Certificates of Deposit	1,000-15,000	Interest	201-1,000
9. Pru-Bache Municipal/New York Taxfree Bonds	50,000- 100,000	Interest	5,000- 15,000
<u>Detail</u>			
- Monroe County	20,000	Interest	1,001- 2,500
- Onondaga County	20,000	Interest	1,001- 2,500
- Syracuse NY Public Improvement	20,000	Interest	1,001- 2,500
- PSNY Muni Money Market	16,231	Interest	201-1,000

## CONTINUATION - SCHEDULE A

JO ANN HARRIS - 7/31/93 for  
Calendar Year 1992 and 1993 to  
6/1/93.Assets and Income

Block A	Block B Value	Block C Type	Amount
10. Defined Benefit Pension Fund			
-Two Annuities/ Northwestern Mutual Life			
	100,000- 250,000	Interest	5,000- 15,000
-Northwestern Mutual Life Whole Policy			
	15,000-50,000		none
-Van Kampen Merritt US Government Bond Fund			
	15,000-50,000	Interest	2,500- 5,000
-Freeman Income Real Estate			
	15,000-50,000	Limited Partnership Dividends	201-1,000
-Alliance Insured			
	1,000-15,000	Interest	201-1,000
11. Northwestern Mutual Annuity IRA			
	1,000-15,000	Interest	none
Spouse Northwestern Mutual Annuity IRA			
	201-1000	Interest	none
12. Office Furniture and Equipment			
	\$20,000		none
13. Resolutions Resources Corp. <sup>1</sup>			
	\$ 5,000	Investment	none
14. Law Prac. receivables \$40,000			
		Earned income	same

<sup>1</sup> The business of Resolution Resources Corp. is alternative dispute resolution. The company provides mediators to resolve disputes, designs alternative dispute systems for institution and businesses, and train mediators. I have received no compensation or other form of income from the Company.

## CONTINUATION - SCHEDULE D

JO ANN HARRIS - 7/31/93 for  
Calendar Year 1992 and 1993 to  
6/1/93

## Part I: Positions Held Outside U.S. Government

Organization	Type	Position	From	To
6. Resolutions Resources Corp.	Corporation	Principal	9/91	Present
7. New York Council Defense Attorneys	Not for Profit Education	Board member	1/91	2/93

## Part II: Compensation in Excess of \$5,000 Paid by One Source

During the reporting period I have been, among other things, a sole practitioner specializing in the defense of individuals under investigation for white collar crimes. A large part of my representation of these individuals is conducted during the secret grand jury phase of these inquiries. If I was successful in my representation, and no charges were brought, the identity of my clients was never known publicly. An important part of my representation was to attempt in this way to protect their privacy and reputations.

It would be entirely inconsistent with the confidentiality to which my clients are entitled for me to disclose their names in this form.

The purpose of this statement is twofold. First, I want to be clear that I am willing to disclose in a public document the names of those clients who have been publicly identified as such. My reason is that once the representation is known, there is no longer a ground for asserting that a client's identity is confidential information. Thus, a list of clients for the years 1991-92-93, whose names are otherwise public or could be discovered from a public record, is appended hereto.

Second, I want to be clear that I am willing to disclose in a public document descriptions of clients whose identity I feel I am duty bound not to disclose. A list describing clients is appended hereto.



CONTINUATION - SCHEDULE D

JO ANN HARRIS - 7/31/93 for  
Calendar Year 1992 and 1993 to  
6/1/93

Third, I want to set forth the authority upon which I  
rely to withhold these client identities from public disclosure. <sup>2</sup>

I am admitted to practice in New York. In this State, DR 4-101(B)(1) and EC 4-2, 4-4 (which bind me professionally) have been interpreted to preclude a lawyer who is a public official from disclosing publicly the identity of clients absent some basis for justifying the release of such information. Indeed, I am commanded to protect a client's identity as a confidence or a secret, regardless of whether the attorney-client privilege attaches as a matter of law. See, e.g., Ethics Opinion No. 1-89, Queens County Bar Association, reported in ABA/BNA Lawyers' Manual on Professional Conduct, Ethics Opinions, 901:6353, p. 121, May 3, 1990. <sup>3</sup>

In the instance of my clients, the release of any facts connecting them with me will lead inevitably to the conclusion

---

<sup>2</sup> I have stated in other papers that I fully understand the need to avoid any conflicts with my former clients and that I will make their names available for review by appropriate authorities, with assurances as to the confidentiality of their identities.

<sup>3</sup> This position is supported by the ABA's Model Rules of Professional Conduct promulgated in 1983. Model Rules of Professional Conduct, 52 U.S.L.W. 6 (Aug. 16, 1983). See proposed Rule 1.6, relating to "Confidentiality of Information", which states in pertinent part "(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation ... "

The Comment to the proposed Rule cited the traditional public policy rationale for the rule, and then made clear that the rule and the policy are given force not only through the law of evidence (attorney client privilege), but also through the rule of confidentiality long established in professional ethics.

"The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law." Id.

CONTINUATION - SCHEDULE D

JO ANN HARRIS - 7/31/93 for  
Calendar Year 1992 and 1993 to  
6/1/93

that they have been represented in connection with law enforcement investigations. This inference would unduly embarrass them; would be unfairly detrimental to their reputations; and would affect their economic relationships with banks and other institutions upon which they rely. Indeed, these types of investigations are kept secret by law, in order to protect individuals and companies from exactly the type of harm I seek to avoid by keeping their identities confidential.

**PUBLIC DISCLOSURE**  
**JO ANN HARRIS CLIENTS 1991-92-93**

Elio Agnese  
 New York, New York  
 Privately retained and then pro bono

Ramon Aguero  
 New York, New York  
 CJA appointment

Raul Barretto  
 Panamian  
 CJA appointment

Elias Bechara  
 Hong Kong businessman  
 Privately retained

Reuben Colmenares  
 Colombian  
 CJA appointment

Fred Delibac  
 Vermont construction worker  
 Privately retained

Cesar Diaz  
 New York, New York  
 CJA appointment

Joseph DiSomma  
 Brooklyn, New York  
 Privately retained

Michael Huang  
 New York, New York  
 CJA appointment

Interedec  
 Real estate holding company involved  
 Local counsel (no legal work)

Sean McCann  
 Toronto, Canada  
 Pro bono client

John Mahoney  
 New York, New York  
 Privately retained

Fred Manko  
 New York, New York  
 Privately retained



City of New York  
 Department of Investigations  
 Assistant Special Commissioner  
 Part-time

Office of Independent Counsel  
 Arlin Adams, Washington D.C.  
 Part-time Associate  
 Independent Counsel

Abraham Ordovery  
 Atlanta, Georgia  
 Professional courtesy

Angelos Petratos  
 Athens, Greece  
 Privately retained

Michael Pugliese  
 Morristown, NJ  
 CJA appointment

David Sakhai  
 New York, New York  
 Privately retained

Arnold Splieth  
 New Jersey resident  
 Privately retained

Nick Stathopoulos  
 Chicago, IL.  
 Privately retained

Joseph Taibi  
 New York, New York  
 Privately retained

Mary Taylor  
 Bronx, New York  
 CJA appointment

Margery Wasserman  
 Tuxedo, New York  
 Privately retained

**JO ANN HARRIS  
PUBLIC DISCLOSURE  
DESCRIPTION OF UNDISCLOSED CLIENTS**

My private practice (as opposed to my pro bono practice) has specialized in advocacy for people and companies in connection with federal inquiries, from administrative proceedings to grand jury investigations to trial in white collar cases including tax, securities, anti-trust, and fraud by and against business.

**Individuals**

Typical individual clients in this fee-producing third of my practice ranged from an ex-Savings and Loan president, to an elderly woman accused of grocery coupon fraud, to bank employees accused of money laundering, to an antique dealer investigated for anti-trust violations, to employees of exchanges and brokerage firms and trading firms, to a woman whose husband is in the Witness Protection program, to businessmen accused of customs fraud, to a number of individuals involved in tax and securities fraud investigations, to labor leaders.

**Companies**

In addition, from time to time during the relevant period, I have represented companies, to wit:

1992-93	A New Jersey armored car company (anti-trust investigation).
1991-92	A New York City construction company (civil tax matter).
1992-93	A company with real estate and investment holdings (local counsel to Washington firm).
1991-92	A Manhattan production company (civil tax matter).
1993	A Manhattan antique company (federal grand jury subpoena).
1991-92	A Long Island antique company (anti-trust investigation).
1990	A Manhattan clothing import company (customs and grand jury investigation).

United States Senate  
Committee on the Judiciary  
Questionnaire for Nonjudicial Nominees  
Eduardo Gonzalez, Nominee for U. S. Marshal

1. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full Name (include any former names used.) Eduardo Gonzalez, Eddie Gonzalez

2. Address: List current place of residence and office address(es).

Residence: 3212 Fair Oaks Avenue,  
Tampa, Florida 33611  
Until September 10, 1993

Effective September 13, 1993  
Renting at: 1201 South Eads Street apt. 1708  
Arlington, Virginia 22202

Business: None

3. Date and Place of Birth: October 24, 1940. Tampa, Florida

4. Marital Status: (Include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

Married. Marina Lourdes Cruz, Homemaker, Student.

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

8/72 to 8/74 - Florida International University  
B. S., Criminal Justice, 8/74.

8/68 to 7/71 - Miami-Dade Community College  
A.A. Police Science, 7/71

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.



6/65 to 3/92 - Metro-Dade Police Department  
9105 N.W. 25 Street  
Miami, Florida 33172

1965 to 1969 - Police officer, assigned to Uniform Patrol,  
Vice Investigations, General Investigations  
Unit.

1969 to 1972 - Sergeant, assigned to Uniform Patrol,  
Robbery Squad, Arson Unit.

1972 to 1978 - Lieutenant, assigned to Uniform Patrol,  
General Investigations Unit, Safe Streets  
Unit, and Administrative Section, Police  
Division.

1978 to 1979 - Captain, Commander of Vice Section,  
Organized Crime Bureau.

1979 to 1980 - Major, Commander South Region.

1980 to 1983 - Division Chief, Court Services Division.

1983 to 1986 - Division Chief, Administrative Division

1986 to 1992 - Deputy Director of Department

3/92 to 7/93 - Chief of Police  
Tampa Police Department  
1710 Tampa Street  
Tampa, Florida 33602

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

7/60 to 4/64 - United States Air Force, Airman First Class  
AF14730131, Honorable Discharge

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and

honorary society memberships that you believe would be of interest to the Committee.

- 1965 - Officer of the Month  
Metro-Dade Police Department  
November
- 1970 - Accepted to Phi Theta Kappa, the National Junior  
College Honor Society at Miami-Dade Junior College.
- 1971 - Selected as the outstanding student for 1971 by the  
faculty of the Police Science Department at Miami-Dade  
Junior College, South Campus.
- 1971 - Selected by a campus nominating committee to be included  
in Who's Who Among Students in American Junior Colleges.
- 1993 - Citizen of the Year Award  
Rotary Club of Tampa West  
June
- 1993 - Outstanding Law Enforcement Achievement Award  
Chapter 1, Florida Council on Crime and Delinquency.  
May
- 1993 - Community Service Award  
Ybor City Optimist Club  
May
- 1993 - President's Award for Outstanding Service  
Ybor City Chamber of Commerce  
May
- 1993 - Outstanding Citizen of the Month  
North Tampa Chamber of Commerce  
June

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

Not applicable

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

a) Lobbying Organizations

International Associations of Chiefs of Police  
 Florida Police Chiefs Association  
 Tampa Bay Area Chiefs of Police Association  
 League of United Latin American Citizens  
 American Association of Retired Persons  
 Hispanic Law Enforcement Officers Association  
 Police Executive Research Forum  
 Fraternal Order of Police

b) Other Organizations

FBI National Academy Associates  
 National Executive Institute Associates  
 Senior Management Institute for Police  
 Hispanic American Police Command Officers Assoc.  
 Cuban Club Foundation, Board of Directors  
 Crossroads of Tampa, Board of Directors

If I am confirmed, I will resign from all the law enforcement organizations which lobby.

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Not applicable

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

Gonzalez, E. "Repairing the Damage: The Metro-Dade



Experience, 1980-1990" FDLE Bulletin, Vol. 4, #2, Spring 1992.

Gonzalez, E., and Aylesworth, G. N., "Property Forfeitures: Using the Criminals Resources to Aid Law Enforcement" Police Chief, February, 1985.

Gonzalez, E., "Metro-Dade Police Pumps Forfeited Assets Back into Community" Subject to Debate, PERF Publications, Vol. 3, #4.

13. Health: What is the present state of your health? List the date of your last physical examination.

Good - Last physical, February, 1992

14. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

March 1992 to July 1993: Appointed Chief of Police Tampa, Florida

15. Legal Career:

a Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

Not applicable

2. whether you practiced alone, and if so, the addresses and dates;

Not applicable

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your

connection with each;

Not applicable

- b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

Not applicable

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

Not applicable

- c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

Not applicable

2. What percentage of these appearances was in:  
 (a) federal courts;  
 (b) state courts of record;  
 (c) other courts

Not applicable

3. What percentage of your litigation was:  
 (a) civil;  
 (b) criminal

Not applicable

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

Not applicable

5. What percentage of these trials was:  
 (a) jury;  
 (b) non-jury

Not applicable

16. **Litigation:** Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:
- (a) the date of representation;
  - (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
  - (c) The individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

Not applicable

17. **Legal Activities:** Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

I believe that my 28 years of law enforcement experiences in two agencies have prepared me to face the challenges confronting the U.S. Marshal's Service as it moves towards the 21st Century.

As Chief of the City of Tampa Police Department, I was responsible for managing the overall operation of an agency comprised of 801 sworn officers and 275 non-sworn employees, with a budget of 58 million dollars. We provided service to 285,000 full time residents who live in over 125 square miles.

This position's greatest challenges were found in several areas. Budget restrictions forced us to do more with less, and the employees responded in a truly professional fashion. In spite of the budget shortfall, we were able to expand our Community Oriented Policing (COP) concepts to areas of the city which had not previously



enjoyed this type of service. This expansion was made possible by the positive attitude demonstrated by our employees, who recognized the importance of this style of policing and made the commitment to work with the agency and the community.

Reorganization was accomplished, with one Deputy Chief's position eliminated and units reassigned according to functions. More important than the physical reorganization of the structure was the redefining of the management philosophy.

It is my belief that professional policing embraces a concept that recognizes that people can make a difference. Consequently, we moved our managers from a mind set that discouraged inter-action with the rank and file officers and the community, to one which demanded that inter-action and community involvement. Rather than a stratified style of management where all decisions were reserved for the Chief, we pushed decision making to the lowest possible level. We asked the rank and file and the community to suggest ways to improve on delivery of service and found both groups very receptive to our inquiries.

Conflict management and conflict resolution were also quite challenging, both internally and externally. In both instances, it has been my experience that good listening will go a long way towards resolving issues. When we experienced a community problem we provided the highest level of accessibility and accountability to resolve the issue. To preclude these tense moments, we established four Citizens Advisory Councils (CAC) in the community. Each of them meets once a month with the Major and officers responsible for their area, more frequently if necessary. Issues of concern are discussed and whenever possible, immediately resolved. It is through mechanisms such as this that the Tampa Police Department and the community forged strong partnerships.

The majority of our internal conflicts arose from an apparent lack of attention to employee and union concerns. Applying the same principles to these issues that were applied to the community, we were able to improve lines of communications and establish ground rules acceptable by both sides. Labor relations were consequently raised to a more professional level, up from the personal confrontations to which they had degenerated. In fact, command officers now attend union board of directors meetings and conversely, union representatives attend departmental staff meetings. It is my belief that issues are best resolved through negotiations rather than confrontations. Although Tampa still has many issues to resolve, it is doing so through negotiations, both internally and externally.

When we closed out the calendar year December, 1992, the department and the community, working closely together, had realized a reduction in all major

crime categories, with the exception of auto theft. Homicides were down, sexual assaults/rapes were down, robberies were down, burglaries were down, and aggravated assaults were down.

My experiences at Metro-Dade also have served to prepare me for the position of Director of the U. S. Marshal's Service. In my last year at Metro-Dade, I was administering a budget that totaled \$254,604,042, including General Fund, Trust Fund, and Capital Budget. The budget supported 3,753 authorized positions, providing direct law enforcement services to over one million people in the unincorporated area and assorted other law enforcement services to the other one million residents in municipalities within the county.

While at Metro-Dade I also served as Chief of the Court Services Division. This division was comprised of four major elements, the Court Liaison Bureau, the Civil Process Bureau, the Warrants Bureau, and the Property and Evidence Bureau. These bureaus all perform missions similar to those performed within the U. S. Marshal's Service.

The Court Liaison Bureau is responsible for court room and judges security, as well as coordination of the Metro-Dade Police Department's activities with other elements of the Criminal Justice System, especially the State Attorney's Office and the Public Defender's Office. It was through this bureau that programs were developed which increased the efficiency and effectiveness of all concerned; e.g. depositions by telephone, a program coordinated with the Public Defender's Office which reduced expenses for both agencies and travel time for the officers. Another program involved the use of closed circuit television for magistrate hearings. This program enhanced security in the courts by reducing the number of prisoners that had to be transported and then secured in the court rooms.

The Civil Process Bureau is responsible for the service of process issued by the circuit court in Dade County. Its professional discharge of its duties has established it as a model for other agencies.

The Warrants Bureau has cooperated with the Marshal's Service on several fugitive round-ups, the most notable being the FIST operations. One of the cost reduction programs implemented in this bureau was a postal notification system which would allow the bureau to notify subjects wanted for minor violations that they should surrender themselves. This program, which was very successful, allowed the detectives to focus their attentions on the more violent criminals for which the bureau was holding warrants.

An additional responsibility I held as Chief of the Court Services Division was to serve as chairman of the Law Enforcement Trust Fund Committee. It was this committee which monitored the asset seizure program and approved requests for program funding. Asset seizures are of great benefit to law enforcement, but only if the process does not become abusive. It is imperative that an agency's asset seizure program be viewed as fair and impartial by all concerned; the legislators, the defendants and the defense bar, the judiciary, and the community at large. Abusive systems will result in the loss of this tremendous benefit.

The distribution of funds included appropriations for task forces and other law enforcement related programs; however, the department also appropriated funds to community based programs which worked with disadvantaged/delinquent youths. Before the state legislators in Florida mandated that a percentage of the seized funds be distributed to community based groups, the Metro-Dade Police Department had established a 15% distribution formula.

Finally, in addition to my formal university education, I am also a graduate of several programs which I believe have contributed significantly to any successes I have enjoyed. These include the FBI National Academy at Quantico, Virginia, an intense three month managerial course; the Senior Management Institute for Police, North Andover, Massachusetts, a three week course offered by the Police Executive Research Forum, which utilizes some of the finest professors from Harvard and Columbia; the National Executive Institute for Police, Quantico, Virginia, the most advanced three week leadership training currently available to CEOs for large agencies across the nation; and the Florida Department of Law Enforcement Chiefs' Executive Seminar, Tallahassee, Florida, another three week course where national experts are brought in to discuss futurism and the law enforcement workplace.



## II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC).

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

I receive retirement income from the Florida Retirement System of approximately \$52,000 a year. I also receive health insurance benefits from Metropolitan Dade County as part of my retirement package. Dade County continues to pay their portion of my health insurance for the next nine years, approximately \$5,000 a year.

I also receive rental income from two rental condominiums located in Miami, Florida. Total income received from these two properties is \$12,900 a year.

Additionally, I currently have approximately \$140,000 in a deferred compensation plan. It is my intention to defer distribution of these funds until 1997.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

I will consult with the Department of Justice Ethics officials in the event of a potential conflict of interest and will recuse myself if necessary. If confirmed I will resign from all law enforcement organizations that lobby.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service in the position to which you have been nominated? If so, explain.

No.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

A copy of S.F. 278 is attached.

5. Please complete the attached financial net worth statement in detail (Add schedules as called for.)

See attached form.

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

During the general election, November, 1992, I allowed Cal Henderson, a candidate for Sheriff of Hillsborough county to use my photograph in one of his campaign ads. This is the extent of my involvement in his campaign. Sheriff Henderson was elected.

### III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

While not a member of the bar and consequently not covered by Cannon 2, I have spent a considerable amount of time in serving the disadvantaged in my capacity of a law enforcement official. During June of this year, I helped organized an inner-city hoops tournament which was held in our College Hill public housing area. Coordinators for this event included public housing residents, other law enforcement agencies, corporate Tampa, and executives from the Boys and Girls Club of Tampa. This basketball tournament was a vehicle we utilized to get inner-city kids introduced to corporate Tampa. Each basketball team was comprised of three corporate members who teamed up with two inner-city kids. We had a total of 36 teams entered in the tournament. The tournament, which was an all day event, attracted hundreds of citizens and included display areas for the corporations and other local agencies as well as vendors selling foods and other goods. The planning committee is already diligently at work planning next year's event.

In April of 1993, we sponsored the first Top Cop Charity Race in the Tampa Bay area. This stock car race, modeled after one with which I had been involved in the Miami area, was held to raise funds for the Police Athletic Leagues in Pinellas and Hillsborough counties and for the Florida Sheriff's Association Boys and Girls Youth Ranches. All of these organizations are primarily concerned with providing assistance to disadvantaged youths in our communities. All of the participants in the race were law enforcement officers. This event raised \$54,000, which was distributed equally to the three charities.

In January of 1993, I was approached by a local city council member who was concerned about the lack of banking facilities in the West Tampa area. She suggested, and I agreed, that we could explore the possibility of co-locating a full service bank branch in the Tampa Police Department sector office, located in West Tampa. In view of my commitment to community oriented policing and the redevelopment of depressed neighborhoods, it seemed an excellent idea. In June of 1993, Sun Bank of Tampa opened their facility in our sector office. Citizens who previously had to travel ten to fifteen miles to conduct their banking business are now able to do so at their local neighborhood branch.

In addition to these major events, I also participate in the Great American Teach-In, which involves spending a day teaching at local elementary schools, serving as a role model for



many of the children in the class. I also serve on the board of directors of Crossroads of Tampa, which is an organization which provides support facilities and services to offenders released from jail. We help these individuals through their transition by providing them a place to live and counseling services as they make their adjustments to become productive citizens in our community. Additionally, Crossroads selects a Principal of the Year in Tampa, with one of the main criteria being the success the principal has had at reducing the drop-out rate at his/her school.

2. Do you currently belong, or have you belonged, to any organization which discriminates on the basis of race, sex, or religion --through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?

No.

# **FINANCIAL STATEMENT** **NET WORTH**

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS		LIABILITIES	
Cash on hand and in banks	123 000	Notes payable to banks—secured	
U.S. Government securities—add schedule	40 129	Notes payable to banks—unsecured	
Listed securities—add schedule	17 274	Notes payable to relatives	
Unlisted securities—add schedule		Notes payable to others	
Accounts and notes receivable:		Accounts and bills due	300
Due from relatives and friends		Unpaid income tax	
Due from others		Other unpaid tax and interest	
Doubtful		Real estate mortgages payable—add schedule	59 927
Real estate owned—add schedule	250 000	Chattel mortgages and other liens payable	
Real estate mortgages receivable	46 000	Other debts—itemize:	
Autos and other personal property	30 000		
Cash value—life insurance			
Other assets—itemize:			
Deferred Compensation (See schedule)	166 000		
F.R.A. Retirement System	52 000		
		Total liabilities	60 277
		Net worth	664 126
		Total liabilities and net worth	724 403
<b>Total assets</b>	<b>724 403</b>		
<b>CONTINGENT LIABILITIES</b>	<b>None</b>	<b>GENERAL INFORMATION</b>	<b>None</b>
As endorser, cosigner or guarantor	NO	Are any assets pledged? (Add schedule.)	NO
On leases or contracts	NO	Are you defendant in any suits or legal actions?	NO
Legal Claims	NO	Have you ever taken bankruptcy?	NO
Provision for Federal Income Tax	NO		
Other special debt	NO		

U.S. GOVERNMENT SECURITIES SCHEDULE

Fortis U. S. Government Securities Fund Inc. (JT TEN)	\$40,129
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LISTED SECURITIES SCHEDULE

Prudential Bache Energy Income Fund V-P21 Limited Partnership (JT TEN)	\$5,238
IRA Prudential Bache Energy Income Fund VI-P26 Limited Partnership, American Capital Comstock Fund, Prudential Money Mart Assets (wife)	5,000
IRA Prudential Bache Energy Income Fund VI-P26 Limited Partnership, American Capital Comstock Fund, Prudential Money Mart Assets (husband)	5,000
American Capital Comstock Fund (JT TEN)	2,036
	<hr/> \$17,274

REAL ESTATE SCHEDULE

Primary Residence: 3212 W. Fair Oaks Avenue Tampa, Florida 33611	\$164,000
Rental Property: El Cid Condominium 5201 N.W. 7 Street, apt. 209W Miami, Florida 33126	31,000
Rental Property: Fox Chase Condominium 8635 N.W. 8 Street, apt. 218 Miami, Florida 33186	55,000
	<hr/> \$250,000



OTHER ASSETS SCHEDULE

Deferred Compensation Plan (husband)	\$141,000
Public Employees Benefit Services Corporation	
Fixed Annuity Account - Nationwide Ins. Co. (70%)	
20th Century Growth Fund (30%)	
Deferred Compensation Plan (wife)	25,000
Public Employees Benefit Services Corporation	
Fixed Annuity Account - Nationwide Ins. Co. (100%)	<hr/>
Total	\$166,000

LIABILITIES SCHEDULEReal Estate Mortgage:

Standard Federal Savings Bank  
P. O. Box 7300  
Gaithersburg, Md. 20898-7300


Property Address:  
Fox Chase Condominium  
8635 N.W. 8 Street #218  
Miami, Florida 33186

Principal: \$52,977.29  
Interest: 6.25% (variable)  
Payment: \$485.22  
Terms: 30 years, incurred 4/85

SF 278 (Rev. 1/91)  
 U.S. HOUSE OF REPRESENTATIVES

# Executive Branch PUBLIC FINANCIAL DISCLOSURE REPORT

 Form Approved  
 GSA GEN. REG. NO. 27

Reporting Status (Check appropriate box) <input type="checkbox"/> Incumbent		Calendar Year Covered by Report: 1992-3/30/93		House of Representatives, Committee, Subcommittees, or Nomination (Month, Day, Year) None		Termination Date (If Applicable) None		Agency Use Only	
Reporting Individual's Name Last Name: <b>Gonzalez</b>		First Name and Middle Initial <b>Eduardo</b>		Title of Position <b>Director</b>		Department or Agency (If Applicable) <b>U.S. Marshall's Services</b>		Office Use Only	
Position for Which Filing <b>Location of Present Office</b> Tampa Police Department 1710 Tampa Street, Tampa, FL 33602		Address (Number, Street, City, State, and ZIP Code) 1710 Tampa Street, Tampa, FL 33602		Telephone No. (Include Area Code) (813) 225-5899		Fee for Late Filing Any individual who is required to file this report and does so more than 30 days after the date the report is required to be filed, or, if an extension is granted, more than 30 days after the date the extension expires, shall be subject to a \$200 fee.			
Position(s) held with the Federal Government during the preceding 12 months (If Not Same as Above) Not applicable		Incumbent: The reporting period is the calendar year ending on the date of termination of the position held in the preceding year. If the reporting period is the calendar year ending on the date of termination of the position held in the preceding year, the reporting period is the calendar year ending on the date of termination of the position held in the preceding year.		Reporting Periods		Incumbent: The reporting period is the calendar year ending on the date of termination of the position held in the preceding year. If the reporting period is the calendar year ending on the date of termination of the position held in the preceding year, the reporting period is the calendar year ending on the date of termination of the position held in the preceding year.			
Pre-qualified Nominee Subject to Senate Confirmation		Name of Congressional Committee Considering Nomination Judicial		Do You Intend to Create a Qualified Unaffiliated Trust? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No		Termination Filers: The reporting period begins at the end of the period covered by your previous filing and ends at the date of termination. Part II of Schedule D is not applicable.			
Certification I CERTIFY that the statements I have made are true, complete, and correct to the best of my knowledge and belief.		Signature of Reporting Individual 		Date (Month, Day, Year) April 30, 1993		Nominees, New Entrants and Candidates for President and Vice President:			
Other Review (If desired by agency)		Signature of Other Reviewer		Date (Month, Day, Year)		Schedule A: The reporting period for income (BLOCK C) is the preceding calendar year and the current calendar year up to the date of filing. Value added in any other year of filing is within 31 days of the date of filing.			
Agency Ethics Officials' Opinion The information contained in this report discloses no conflict of interest under applicable laws and regulations.		Signature of Designated Agency Ethics Official (Retaining Official)		Date (Month, Day, Year)		Schedule B: Not applicable.			
Office of Government Ethics Use Only		Signature		Date (Month, Day, Year)		Schedule C, Part I (Liabilities): The reporting period is the preceding calendar year and the current calendar year up to the date of filing.			
Comments of Retaining Officials (If additional space is required, use the reverse side of this sheet)						Schedule D: The reporting period is the preceding two calendar years and the current calendar year up to the date of filing.			

Previous Editions Cannot Be Used

SF 278-111

(Check box if form is not continued on the reverse side)

GSA GEN. REG. NO. 27





Eduardo Gonzalez

## SCHEDULE A

2

Assets and Income		Valuation of Assets at close of reporting period		Income: type and amount. If "None (or less than \$201)" is checked, no other entry is needed in Block C for that item.												Date (Mo., Day, Yr.)																
BLOCK A		BLOCK B		BLOCK C												BLOCK D																
Identify each asset held for the production of income, and the market value exceeding \$1,000 at the close of the reporting period.		Identify each asset or source of income which generated over \$200 in income during the reporting period.		None (or less than \$1,001)	\$1,001 - \$15,000	\$15,001 - \$50,000	\$50,001 - \$100,000	\$100,001 - \$250,000	\$250,001 - \$500,000	\$500,001 - \$1,000,000	Over \$1,000,000	Dividends	Rent and royalties	Interest	Capital Gains	Excepted Investment Fund	Excepted Trust	Qualified Trust	Other (Specify Type)	None (or less than \$201)	\$201 - \$1,000	\$1,001 - \$2,500	\$2,501 - \$5,000	\$5,001 - \$15,000	\$15,001 - \$50,000	\$50,001 - \$100,000	\$100,001 - \$1,000,000	Over \$1,000,000	Actual Amount Only if "Other" specified	Date (Mo., Day, Yr.) Only if "None" is checked		
9.	None <input type="checkbox"/>																															
10.	Central Airlines Common																															
11.	Ex-amples																															
12.	None (or less than \$1,001)																															
13.	American Capital Comstock Fund																															
14.	Fortis U.S. Government Securities																															
15.	Great Western Bank, Miami, FL Savings Certificates/Checking																															
16.	Dade County Credit Union, Miami, FL. Checking/Savings																															
17.	Coral Gables Federal, Coral Gables, FL Savings Certificates																															
18.	Tampa Bay Credit Union Tampa, FL. Checking/Savings																															

Eduardo Gonzalez

# SCHEDULE A

Page Number  
3

Income: type and amount. If "None (or less than \$201)" is checked, no other entry is needed in Block C for that item.

Valuation of Assets  
at close of  
reporting period  
BLOCK B

Assets and Income

BLOCK A

WRITE C

S.	Identify each asset held for the production of income which had a fair market value exceeding \$1,000 at the close of the reporting period.  Identify each asset or source of income which exceeded \$200 in income during the reporting period.	Valuation of Assets at close of reporting period (BLOCK B)								Income: type and amount (BLOCK C)										Date (Mo., Day, Yr.) Only if "Other" specified Honoraria								
		None (or less than \$1,001)	\$1,001 - \$15,000	\$15,001 - \$50,000	\$50,001 - \$100,000	\$100,001 - \$250,000	\$250,001 - \$500,000	\$500,001 - \$1,000,000	Over \$1,000,000	Dividends	Rent and Royalties	Interest	Capital Gains	Excepted Investment Fund	Excepted Trust	Qualified Trust	Other (Specify Type)	None (or less than \$201)	\$201 - \$1,000		\$1,001 - \$2,500	\$2,501 - \$5,000	\$5,001 - \$15,000	\$15,001 - \$50,000	\$50,001 - \$100,000	\$100,001 - \$1,000,000	Over \$1,000,000	Actual Amount Only if "Other" specified
1	<input type="checkbox"/> None <input type="checkbox"/> Combat Airforce Command <input type="checkbox"/> Des Moines & Smith, Veterans, USA <input type="checkbox"/> Remembrance Equity Fund <input type="checkbox"/> Des Moines & Smith pension plan																											
2	Nations Bank, Tampa, FL Checking/Savings		X								X								X									
3	Public Employees Benefit Services Corporation-Deferred Compensation Plan (Husband)					X						X									X							
4	Public Employees Benefit Services Corporation-Deferred Compensation Plan (Wife)							X					X															
5	Florida Retirement System																											
6	Metro-Dade County Miami, FL																									\$52,000		
7	City of Tampa Police Dept.																									\$5,340.36		
8																										\$109,150		

SF 278 (Rev. 1/91)  
U.S. Office of Government Ethics

Reporting Individual's Name

Eduardo Gonzalez

# SCHEDULE B

New Entries/Nominees/Candidates:  
Schedule Not Applicable

Page Number

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## Part I: Transactions

Report any purchase, sale, or exchange by you, your spouse, or dependent child during the reporting period of any real property, stocks, bonds, commodity futures, and other securities when the amount of the transaction exceeded \$1,000. Include transactions that resulted in a loss. Do not report a transaction involving property used solely as your personal residence, or a transaction solely between you, your spouse, or dependent child. Check the "Certificate of divestiture" block to indicate sales made pursuant to a certificate of divestiture from OGE.

Transaction Type (1)	Date (Mo./Day/ Yr.)	Description	Amount of Transaction (2)	Certificate of Divestiture (3)
1				
2				
3				
4				
5				

## Part II: Gifts, Reimbursements, and Travel Expenses

Report the source, a brief description (including travel, sales, and the nature of expenses provided), and the value of: (1) transportation, lodging, food, or entertainment received from one source totaling \$250 or more (unless received as personal hospitality at the home of a personal or family residence); (2) other gifts from one source totaling \$100 or more in value; and (3) cash reimbursements of \$250 or more from one source. Exclude gifts, reimbursements and travel expenses from the U.S. Government. Also exclude gifts from relatives, gifts of \$15 or less when aggregating gifts for the total from one source, and gifts and reimbursements received by your spouse or dependent child that were given totally independent of the relationship to you. See instructions for further exclusions.

Source (Name and Address)	Brief Description	Value
1		
2		
3		
4		
5		

Provide Reimbursements Covered Not Used





Reporting Individual's Name <b>Eduardo Gonzalez</b>		Page Number <b>5</b>	
<b>SCHEDULE C</b>			

**Part I: Liabilities**

Report liabilities over \$10,000 owed to any one creditor at any time during the reporting period by you, your spouse, or dependent child. Check the highest amount owed during the reporting period. Exclude a mortgage on your personal residence unless it is rented out; loans secured by automobiles, household furniture or appliances; and liabilities owed to certain relatives listed in instructions. See instructions for revolving charge accounts.

Creditors (Name and Address)		Type of Liability	1981	1982	1983	1984	1985	1986	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2032	2033	2034	2035	2036	2037	2038	2039	2040	2041	2042	2043	2044	2045	2046	2047	2048	2049	2050	2051	2052	2053	2054	2055	2056	2057	2058	2059	2060	2061	2062	2063	2064	2065	2066	2067	2068	2069	2070	2071	2072	2073	2074	2075	2076	2077	2078	2079	2080	2081	2082	2083	2084	2085	2086	2087	2088	2089	2090	2091	2092	2093	2094	2095	2096	2097	2098	2099	2100	2101	2102	2103	2104	2105	2106	2107	2108	2109	2110	2111	2112	2113	2114	2115	2116	2117	2118	2119	2120	2121	2122	2123	2124	2125	2126	2127	2128	2129	2130	2131	2132	2133	2134	2135	2136	2137	2138	2139	2140	2141	2142	2143	2144	2145	2146	2147	2148	2149	2150	2151	2152	2153	2154	2155	2156	2157	2158	2159	2160	2161	2162	2163	2164	2165	2166	2167	2168	2169	2170	2171	2172	2173	2174	2175	2176	2177	2178	2179	2180	2181	2182	2183	2184	2185	2186	2187	2188	2189	2190	2191	2192	2193	2194	2195	2196	2197	2198	2199	2200	2201	2202	2203	2204	2205	2206	2207	2208	2209	2210	2211	2212	2213	2214	2215	2216	2217	2218	2219	2220	2221	2222	2223	2224	2225	2226	2227	2228	2229	2230	2231	2232	2233	2234	2235	2236	2237	2238	2239	2240	2241	2242	2243	2244	2245	2246	2247	2248	2249	2250	2251	2252	2253	2254	2255	2256	2257	2258	2259	2260	2261	2262	2263	2264	2265	2266	2267	2268	2269	2270	2271	2272	2273	2274	2275	2276	2277	2278	2279	2280	2281	2282	2283	2284	2285	2286	2287	2288	2289	2290	2291	2292	2293	2294	2295	2296	2297	2298	2299	2300	2301	2302	2303	2304	2305	2306	2307	2308	2309	2310	2311	2312	2313	2314	2315	2316	2317	2318	2319	2320	2321	2322	2323	2324	2325	2326	2327	2328	2329	2330	2331	2332	2333	2334	2335	2336	2337	2338	2339	2340	2341	2342	2343	2344	2345	2346	2347	2348	2349	2350	2351	2352	2353	2354	2355	2356	2357	2358	2359	2360	2361	2362	2363	2364	2365	2366	2367	2368	2369	2370	2371	2372	2373	2374	2375	2376	2377	2378	2379	2380	2381	2382	2383	2384	2385	2386	2387	2388	2389	2390	2391	2392	2393	2394	2395	2396	2397	2398	2399	2400	2401	2402	2403	2404	2405	2406	2407	2408	2409	2410	2411	2412	2413	2414	2415	2416	2417	2418	2419	2420	2421	2422	2423	2424	2425	2426	2427	2428	2429	2430	2431	2432	2433	2434	2435	2436	2437	2438	2439	2440	2441	2442	2443	2444	2445	2446	2447	2448	2449	2450	2451	2452	2453	2454	2455	2456	2457	2458	2459	2460	2461	2462	2463	2464	2465	2466	2467	2468	2469	2470	2471	2472	2473	2474	2475	2476	2477	2478	2479	2480	2481	2482	2483	2484	2485	2486	2487	2488	2489	2490	2491	2492	2493	2494	2495	2496	2497	2498	2499	2500	2501	2502	2503	2504	2505	2506	2507	2508	2509	2510	2511	2512	2513	2514	2515	2516	2517	2518	2519	2520	2521	2522	2523	2524	2525	2526	2527	2528	2529	2530	2531	2532	2533	2534	2535	2536	2537	2538	2539	2540	2541	2542	2543	2544	2545	2546	2547	2548	2549	2550	2551	2552	2553	2554	2555	2556	2557	2558	2559	2560	2561	2562	2563	2564	2565	2566	2567	2568	2569	2570	2571	2572	2573	2574	2575	2576	2577	2578	2579	2580	2581	2582	2583	2584	2585	2586	2587	2588	2589	2590	2591	2592	2593	2594	2595	2596	2597	2598	2599	2600	2601	2602	2603	2604	2605	2606	2607	2608	2609	2610	2611	2612	2613	2614	2615	2616	2617	2618	2619	2620	2621	2622	2623	2624	2625	2626	2627	2628	2629	2630	2631	2632	2633	2634	2635	2636	2637	2638	2639	2640	2641	2642	2643	2644	2645	2646	2647	2648	2649	2650	2651	2652	2653	2654	2655	2656	2657	2658	2659	2660	2661	2662	2663	2664	2665	2666	2667	2668	2669	2670	2671	2672	2673	2674	2675	2676	2677	2678	2679	2680	2681	2682	2683	2684	2685	2686	2687	2688	2689	2690	2691	2692	2693	2694	2695	2696	2697	2698	2699	2700	2701	2702	2703	2704	2705	2706	2707	2708	2709	2710	2711	2712	2713	2714	2715	2716	2717	2718	2719	2720	2721	2722	2723	2724	2725	2726	2727	2728	2729	2730	2731	2732	2733	2734	2735	2736	2737	2738	2739	2740	2741	2742	2743	2744	2745	2746	2747	2748	2749	2750	2751	2752	2753	2754	2755	2756	2757	2758	2759	2760	2761	2762	2763	2764	2765	2766	2767	2768	2769	2770	2771	2772	2773	2774	2775	2776	2777	2778	2779	2780	2781	2782	2783	2784	2785	2786	2787	2788	2789	2790	2791	2792	2793	2794	2795	2796	2797	2798	2799	2800	2801	2802	2803	2804	2805	2806	2807	2808	2809	2810	2811	2812	2813	2814	2815	2816	2817	2818	2819	2820	2821	2822	2823	2824	2825	2826	2827	2828	2829	2830	2831	2832	2833	2834	2835	2836	2837	2838	2839	2840	2841	2842	2843	2844	2845	2846	2847	2848	2849	2850	2851	2852	2853	2854	2855	2856	2857	2858	2859	2860	2861	2862	2863	2864	2865	2866	2867	2868	2869	2870	2871	2872	2873	2874	2875	2876	2877	2878	2879	2880	2881	2882	2883	2884	2885	2886	2887	2888	2889	2890	2891	2892	2893	2894	2895	2896	2897	2898	2899	2900	2901	2902	2903	2904	2905	2906	2907	2908	2909	2910	2911	2912	2913	2914	2915	2916	2917	2918	2919	2920	2921	2922	2923	2924	2925	2926	2927	2928	2929	2930	2931	2932	2933	2934	2935	2936	2937	2938	2939	2940	2941	2942	2943	2944	2945	2946	2947	2948	2949	2950	2951	2952	2953	2954	2955	2956	2957	2958	2959	2960	2961	2962	2963	2964	2965	2966	2967	2968	2969	2970	2971	2972	2973	2974	2975	2976	2977	2978	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## Gonzalez

Source: Ministry

## Part I: Positions Held Outside U.S. Government

Accept any positions held during the applicable reporting period, whether compensated or not. Positions include but are not limited to those of an officer, director, trustee, general partner, representative, employee or consultant of any corporation, firm, partnership, or other business enterprise or any non-profit organization or educational institution. Exclude positions with religious, social, fraternal, or political entities and those solely of an honorary nature.

□

Examples	Organization (Name and Address)	Type of Organization		Position Held		Term (Mo., Yr.)		To (Mo., Yr.)
		Non-profit collection	Law firm	President	Partner	govt	yes	
1	Crossroads of Tampa 1441 Ave. of Risk Collection, P.O. Box Dun Jover & Smith, Hainesville, USA	Non-profit rehabilitation		Board of Directors		7/92		Present
2	Cuban Club Foundation	Non-profit restoration		Board of Directors		1/93		Present
3								
4								
5								
6								

## Part II: Compensation In Excess Of \$5,000 Paid by One Source

Report sources of more than \$5,000 compensation received by you or your spouse, partner, or dependent child from any source during the year, including but not limited to, any business affiliation for services provided directly by you during the reporting period. This includes the names of clients and customers of any concentration.

Incumbent /  
Termination Filer/  
Candidate:  
Not Applicable

None

Source (Name and Address)		Brief Description of Duties
1	Dr. J. C. Smith, 123 Main St., Springfield, USA	Legal services
2	Example: Mexico University (School of Law & Social Sciences), Mexico City, Mexico	Legal services in connection with university construction
3		
4		
5		
6		

Northern California Coastal Redwood



## Repairing the Damage: The Metro-Dade Experience, 1980-1990 by Chief Eduardo Gonzalez Tampa Police Department

Dade County's racial/ethnic mix places extra demands on the Metro-Dade Police Department (MDPD) and increases frustration levels among the citizens it serves. One of the more significant examples of this tension is the May, 1980, McDuffie riot, which occurred in Dade County following the acquittal, by an all-white jury in Tampa, of four white MDPD officers accused in connection with the beating death of an African-American citizen, Arthur McDuffie.

While the social and economic conditions which lead to the riot were beyond the control of the Department, MDPD command staff acknowledged that past performance, based on a "professional" model of policing, fell short of demonstrating interest in and concern for citizens. Interest and concern which must be an integral part of any modern day policing strategy.

As an important first step, command staff met to discuss a comprehensive program to improve delivery of services. Members selected a number of initiatives to improve input from the community:

- a) Improve relations with the Dade County Community Relations Board.
- b) Establish Citizens Advisory Councils (CAC's) in each of the six district stations. The County Manager appointed CACs would advise MDPD on policies and procedures impacting their respective neighborhoods, and would be representative of all elements of the concerned community, especially community leaders.
- c) Establish a committee of involved minority citizens to review entry level and in-service interpersonal skills training.
- d) Establish dialogue with the

African-American ministers organizations, including People United to Lead the Struggle for Equality (PULSE). MDPD subsequently signed a contract with PULSE regarding service levels in the African-American community, and provided them with monthly progress reports.

- e) Provide Law Enforcement Trust funding, for worthwhile community based programs designed to assist troubled youth facing severe cutbacks.

*While the social and economic conditions which lead to the riot were beyond the control of the Department, MDPD command staff acknowledged that past performance...fell short of demonstrating interest in and concern for citizens.*

Second, the department embarked on the following "new hire" initiatives:

- a) Ensure that hiring mirrors the community MDPD serves: 50% Hispanic, 30% Anglo, 20% African-American, and 25% Female. While MDPD grew by 60% from 1980 to 1990 (1,333 sworn to 2,600 sworn), African-American officers increased by 245%, Hispanics by 630% and females by 324%. Sworn personnel dropped from 79% Anglo male to less than 50%.
- b) Review entry-level standards. MDPD went from a system that required a civil service exam, a

cursory background check, a physical, and an oral board, to one which requires: 1) a civil service exam; 2) a job-related evaluation at the line entry Assessment Center; 3) a battery of psychological tests and evaluations; 4) an extensive physical exam, including drug testing; 5) increased use of polygraph; and 6) a comprehensive background check. With the new standards, for every candidate hired by MDPD, 15 applicants are eliminated.

- c) Create para-professional positions. The new *Police Service Aide* position allows candidates who are short of the necessary qualifications to be a police officer to improve their status, and is now considered an integral part of operations.

d) Evaluate sworn/civilian duties. Converting many duties from sworn to civilian permitted the additional hiring of minorities who had no interest in a sworn position but who could be an asset to the department in jobs such as desk personnel, background investigators and crime analysts. Approximately 32% of MDPD's over 3,735 personnel is civilian, one of the highest rates in the nation.

Third, although in 1980 MDPD exceeded the state mandatory hours for entry level training and had an excellent in-service training program, the department decided to institute the following changes and new programs:

- a) MDPD recruits now receive seven months of basic training in order to meet State Certification Standards, some of which results in college credits. Since 1980, the department has increased human skills training in the police academy by 642% (to 178 hours), to include topics such as cultural/racial awareness, effective

communications skills, violence reduction, and investment in excellence.

b) Following completion of the academy, each officer is assigned to the 15 week Field Training Officer (FTO) program, where that officer is closely evaluated by a skilled FTO before being allowed to ride alone. The officer is then monitored for an additional six months by an FTO supervisor before being approved for permanent employment.

c) In-service training was designed to keep the officer abreast of the latest developments and techniques. In the area of

• Violence Reduction Training (40 hrs)

• Survival Training (16 hrs)

Along with greater interaction with the community, enhanced recruitment and improved training, the Department also examined the handling and disposition of police misconduct complaints. Brochures were printed and distributed in the various communities outlining the process for filing complaints, including anonymous complaints. Investigations were scheduled for completion within a 60-day time frame, after which all investigations became public record.

Internal Affairs (now the Professional Compliance Bureau) moved out of police headquarters and into an office building, to eliminate the "chilling effect" headquarters could have on a complaint. Staffing was reviewed to insure the right mix and availability of personnel, so that a complainant might feel more comfortable with the process. All Investigators in the Bureau are Sergeants.

Departmental review of Internal Affairs cases was placed with a Disposition Panel comprised of police executives (Majors and above) who had no proprietary interest in the case. The complaint sustained rate immediately increased to 30+%, and has averaged over 20% for the last 6 years, which is much higher than in many comparable departments. Once a case has been dealt with by the Disposition Panel, it is sent to the officers' command for further action. On sustained cases where discipline is to be imposed, the commander is required to check with the Department Discipline Coordinator to ensure that the discipline falls within an acceptable range, i.e., that it is similar to discipline other individuals have

received for like violations.

In addition to altering the complaint process, the Department also instituted a computerized multi-level Early Warning System to identify officers who may be experiencing stress-induced or other performance problems. This process allows for time-sensitive tracking and trend analysis and for effective command action as required.

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***Most significant is that during the past five years, in an increasingly volatile and demanding environment, the average number of arrests per MDPD officer has risen by 60% while excessive force complaints per officer have declined by 14%.***

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Officers identified through this system are profiled on a quarterly and annual basis. The quarterly report contains the names of employees who have received 2 or more complaints and/or been involved in 3 or more use of force incidents during a six month period. An annual report serves as a secondary system and will contain the names of employees who have received 4 or more complaints or who have been involved in 7 or more use of force incidents and/or 2 or more shooting incidents during a 12-month period. In both cases the data is disseminated to the

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***Since 1980, the department has increased human skills training in the police academy to include topics such as cultural/racial awareness, effective communications skills, violence reduction, and investment in excellence.***

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violence reduction and improved interpersonal-skills, the department offered the following:

- Stress Awareness and Reduction (40 hrs)
- Crisis Intervention (40 hours)
- Human and Community Relations (40 hrs)
- Investment in Excellence (40 hrs)
- Police Effectiveness Awareness Key (PEAK, 16 hrs)

- Alternatives to Use of Force (8 hrs)

appropriate supervisors for review. A summary of their findings must be forwarded to the Professional Compliance Bureau Commander. The reports are reviewed in conjunction with other departmental criteria to achieve a fair and meaningful assessment.

The MDPD system has been reviewed favorably by the United States Civil Rights Commission. Most significant is that during the past five years, in an increasingly volatile and demanding environment, the average number of arrests per MDPD officer has risen by 60% while excessive force complaints per officer have declined by 14%. Total departmental personnel complaints have dropped 26%.

The Department also established a comprehensive psychological services program in 1980, which is administered by the Health Services Section. Law enforcement involves a broad range of situations requiring understanding and control of human behavior. Emotional stability in the face of stressful situations is a prime requirement for effective police action.

Comprehensive psychological services provide support for these tasks through the following approaches:

a) Professional Assistance: Through voluntary or mandatory identification, short-term counseling and referral services are provided to departmental employees experiencing stress-induced or other emotional problems.

b) Early identification: Attempts are made to identify personnel with emotional or stress-related problems before performance is seriously affected.

Metro-Dade officers interact on a daily basis with the community, particularly the minority community, through assignment to the Public Housing Police Bureau, Team Police Units, and as Community Service Officers. MDPD officers teach Drug Abuse Resistance Education (DARE) classes in all elementary schools and serve as Police Athletic League officers, providing Dade County youth with an alternative to drugs and crime.

It is clear that to have any impact on police/citizen violence, law enforcement agencies must coordinate a variety of components within their organizations.

Police/citizen violence will not be reduced simply by training, or improved procedures, or internal investigations. Although MDPD has been effective in reducing police/citizen violence complaints, the need for continued improvement is recognized. Information on procedures and programs is available to other law enforcement agencies for inspection, and MDPD command staff welcomes and encourages any input or criticism which will improve service delivery.

*The author, Eduardo Gonzalez, joined the Metro-Dade Police Department in 1965 and served in a number of capacities, including Deputy Director of the Department. He left Metro-Dade in March 1992, to accept his current position as Chief of the Tampa Police Department. Chief Gonzalez is past-president of the Hispanic-American Command Officers Association and a member of the Florida Police Chiefs Association. He holds a bachelors degree from FIU and is a graduate of the FBI National Academy.*



# Property Forfeiture: Using the Criminal's Resources to Aid Law Enforcement

By EDUARDO GONZALEZ and GEORGE N. AYLESWORTH

**F**orfeiture, the power of a sovereign government to take property that has been used to commit a criminal offense, is an ancient procedure that has long been part of the law of federal and many state governments. Florida has had forfeiture provisions for many years, but in 1980, sweeping changes were made in Florida's forfeiture laws that transformed them into powerful law enforcement tools.<sup>1</sup>

These statutes, as amended and subsequently renumbered,<sup>2</sup> were broadened to include as forfeitable contraband articles "... any controlled substance, device, paraphernalia, or currency, or other means of exchange, which has been, is being, or is intended to be used ..." to violate Florida law concerning controlled substances; as well as "... any personal property, including—but not limited to—any item, object, tool, substance, device, weapon, machine, vehicle of any kind, money, securities, or currency, which has been or is actually employed as an instrumentality in the commission of, or in aiding or abetting the commission of, any felony ..."<sup>3</sup> Additionally, the 1980 amendments allow a police agency to use the services of an attorney employed by the agency to maintain forfeiture actions independently, as well as through the local prosecuting attorney.<sup>4</sup> This allows a police agency to maintain a high caseload of forfeiture actions without creating an adverse impact on the prosecutor.

## MDPD's Legal Unit

The Police Legal Unit of the Metro-Dade Police Department (MDPD), which consists of four attorneys, an investigator and three clerical personnel, prosecutes all forfeiture cases for MDPD. Prior to the amendment allowing agency-employed at-

torneys to handle forfeitures, the police legal advisors of the Legal Unit handled the cases as specially appointed assistant state attorneys. The Legal Unit created internal systems to handle the increased caseload occasioned by the broadening of the forfeiture law, and developed and produced copyrighted forfeiture and investigator's manuals to allow for increased efficiency. The Legal Unit now maintains an average caseload of over 250 pending cases, and has obtained forfeitures amounting to over \$1 million per year for Fiscal Years 1980-81 and 1981-82. As an example of the types of property forfeited, during the period from Jan. 1 through March 31, 1983, Dade County was awarded four cars and a boat trailer, worth \$27,600, and currency totaling \$186,546.

Other procedural changes were also made in the forfeiture provisions, creating an immediate financial benefit to law enforcement agencies and simultaneously removing the tools of crime from the hands of criminals. These changes require that the governing body with budgetary control over a law enforcement agency establish a special Law Enforcement Trust Fund (LETF) for the particular agency. Thereafter, the proceeds from sales of any forfeited property not retained for use by the law enforcement agency, plus any currency forfeited by the agency, are to be deposited into the LETF, to be appropriated by the governing body for the exclusive use of the agency. (Property encumbered with a properly recorded and preserved lien must be sold at auction and the funds remaining after payment of the lien and expenses deposited into the LETF.)

In appropriating funds for the use of the forfeiting agency, the governing body must appropriate funds to be used solely to "... defray the costs of protracted or complex investigations, to provide additional technical equipment or expertise, to provide matching funds to obtain federal grants, or for such other law enforcement purposes as the Board of County Commissioners or governing body of the municipality deems appropriate ..."<sup>5</sup> Additionally, funds deposited into the LETF cannot be considered as a source of revenue to meet normal operating expenses.

In Dade County, the LETF for the Metro-Dade Police Department was created by the Board of County Commissioners. Within MDPD, responsibility for screening requests for expenditures from the LETF was delegated to the LETF

Screening Committee, which reviews requests and makes recommendations regarding appropriate action to Bobby L. Jones, director of the department. Recommendations approved by the director are then presented to the Board of County Commissioners for the final approval and appropriation required by law.

The committee is chaired by the chief of the Court Services Division. Members include the chiefs of the other four divisions—Police, Special Services, Central Services and Administrative—as well as the Organized Crime Bureau commander and the North Regional colonel. The department's fiscal officer and a legal advisor serve the committee in an advisory capacity.

Since its inception in January 1981, the committee has recommended approval of expenditure requests totalling approximately \$800,000. Conversely, it has recommended disapproval of requests exceeding \$900,000.

## Conclusion

The ability to appropriate property that is used to commit a crime, or that constitutes the proceeds from criminal activity, is a valuable law enforcement tool that can lower the incidence of certain types of crimes by targeting the resources used by criminals to commit those offenses, or by removing the proceeds derived from the criminal activity. Additionally, if the forfeited property can be used by the seizing agency, the resources available to law enforcement to fight crime can be increased.

Since a forfeiture action takes place in civil court, where the standard of proof is less than in criminal court, the property forfeiture may be successful even if the criminal case is not. This provides an additional incentive to the seizing officer, because a defendant who escapes criminal punishment will still be subject to an economic sanction. While the types of property that may be forfeited will vary among jurisdictions, any law enforcement agency should be able to derive some benefit from a forfeiture law similar to that in effect in Florida. \*

CHIEF EDUARDO GONZALEZ has been with the Metro-Dade Police Department, 1320 N.W. 14th St., Miami, FL 33125, for over 18 years. Formerly, the chief of the Court Services Bureau, where he served as chairman of the Law Enforcement Trust Fund, he is now the chief of the Administrative Division. He has worked in most areas of the Department, including the Organized Crime Bureau, Safe Streets Unit, detective functions, and uniform patrol. He is a graduate of the FBI National Academy, and of Florida International University.

GEORGE N. AYLESWORTH, supervisor of the Police Legal Unit, Metro-Dade Police Department, is a graduate of the University of Miami School of Law and a member of the Florida Bar. He was assigned to the Uniform Bureau of the Metro-Dade Police Department for three years prior to his promotion to police sergeant in 1979. Mr. Aylesworth was appointed as the supervisor of the Police Legal Unit in 1980.

<sup>1</sup>FL 80-26 Laws of Florida, amending Secs. 943.41-943.44, Florida Statute, 1980.

<sup>2</sup>Secs. 943.41-943.44 renumbered as Secs. 932.701-932.704, Florida Statute, 1981.

<sup>3</sup>Sec. 932.701, Florida Statute, 1981.

<sup>4</sup>Sec. 932.702, Florida Statute, 1981.

<sup>5</sup>Sec. 932.704, Florida Statute, 1981.

# Subject to Debate

A NEWSLETTER OF THE POLICE EXECUTIVE RESEARCH FORUM

## Metro-Dade Police Pump Forfeited Assets Back Into Community

By Eduardo Gonzalez

As the result of a recent amendment to an innovative 1980 Florida law, the Metro-Dade Police Department (MDPD) has been able to disburse money forfeited by drug dealers to community anti-drug abuse and crime prevention programs.

The Florida Contraband Forfeiture Act, provides for the establishment of Law Enforcement Trust Funds (LETF) for municipal and county law enforcement agencies throughout the state. Since the inception of the LETF, approximately \$24,000,000 has been forfeited and appropriated for projects permissible under the act.

In its original form, the act required that forfeited proceeds be used only for specified law enforcement needs. These included the cost

of protracted or complex investigations and additional technical equipment or expertise, matching funds for federal grants, or other law enforcement purposes approved by a local governing body. A 1987 amendment to the act allows funds to be spent on school resource officers (who teach pedestrian safety and help resolve conflicts in primary schools), crime prevention, or drug abuse education programs.

### **\$800,000 has been disbursed to 'community-based projects.**

Approximately 65% of the proceeds seized to date have been expended on the purchase of technical equipment, including a computer aided dispatch system (CAD), an automated information network, two Jet Ranger helicopters and some very sophisticated lab equipment. This equipment has enabled the department to remain in step with advances in crime fighting techniques.

The amendment that allowed for the expenditure of LETF monies on

school resource, crime prevention or drug education programs enjoys the full support of MDPD Director Fred Taylor. Taylor has demonstrated his commitment to this amendment by pledging up to 20% of the Metro-Dade fund to community-based programs that meet certain criteria.

To date, approximately \$800,000 in LETF monies has been disbursed to community-based projects. The largest allocation (\$339,000), was given to Metro-Dade County to address juvenile substance abuse. Additional allocations have ranged from a \$30,000 award to Crime Stoppers, an organization that solves crimes and apprehends fugitives through media coverage and phone tips, to a \$64,000 grant provided to Informed (cont. next page)

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Subject to Debate, published bi-monthly by the Police Executive Research Forum, welcomes input from PERF members. Please submit articles, ideas and suggestions to Martha Plotkin, editor, or Karin Schmerler, managing editor, at 2300 M Street, N.W., Suite 910, Washington, DC 20037. Subscription price: \$15/yr.

(Assets cont. from previous page)

Families of Dade County, which works with a variety of drug education programs. The MDPD also allocated \$50,000 to the Greater Miami Chamber of Commerce to help fund a program to reduce drug usage in the workplace, a major problem in the Miami area.

However, the police department has rejected approximately \$300,000 worth of requests from community-based organizations as a result of their inability to meet the established criteria outlined below.

- The organization must be non-profit.
- The requested funding must be for a distinct project or program.
- The purpose of the project or program must be drug abuse education or crime prevention.
- The project or program must be done with and under the control of the MDPD.
- No part of the LETF funds can be used for paying salaries or ad-

ministrative costs of the external organization.

- A detailed accounting of all expenditures of LETF funds must be made and provided to the MDPD.
- All the foregoing requirements must be addressed in the request for LETF funding.

All trust fund requests, whether internal or external, must be presented to the LETF Committee, utilizing the LETF request form. This form insures compliance with requirements of state law, and provides accountability for all expenditures. The Florida Department of Law Enforcement audits the fund.

### Taylor Believes Police Need Community's Help In Handling Crime Problem

Taylor's support for community-based organizations is predicated on his belief that an agency cannot ef-

fectively deal with crime problems without community support—regardless of the amount of money generated through forfeiture proceedings or the regular police budget process. The department has found that, with additional financial support, these organizations can have a greater impact on crime. In Dade County, especially, the programs aimed at young people at risk for drug involvement have been quite successful.

The MDPD encourages other agencies that receive funds through asset forfeiture to share some of those funds with organizations that are as committed to improving the quality of life in their communities as are the police. For more information on the Metro-Dade Police Department's program, contact the author at (305) 547-4831. ■

Eduardo Gonzalez is the deputy director of the Metro-Dade Police Department.

## Support Builds for Gun Restrictions

Several large law enforcement, government and trade associations recently adopted resolutions calling on Congress to pass stricter gun regulations. The resolutions addressed the proliferation of assault weapons and the high number of suicides, murders and accidental deaths by handgun each year.

Previously neutral, the National Sheriffs' Association (NSA) adopted a resolution at their June annual meeting in support of both "federal and state initiatives to allow the law enforcement community a reasonable period of time to conduct a records check on anyone wishing to purchase a hand-

gun." Both the U.S. Conference of Mayors and the American Medical Association passed similar resolutions at their annual meetings, calling for a national one-week waiting period for handgun purchases. In addition, the National League of Cities' (NLC) board recently voted to support a 30-day waiting period.

NSA, the Mayors, NLC and the National Association of Counties (NACo) also adopted organizational resolutions in favor of a ban on assault weapons. NSA and NACo went one step further, officially endorsing Sen. Howard Metzenbaum's bill (S.386), which would ban at least 26 weapons by name. The AMA's House of Delegates also approved a resolution favoring legislation to "restrict the sale and private ownership" of assault weapons. ■

### METAPOL

METAPOL, PERF's nationwide telecommunications network, is now available for a one-time membership fee of \$100 and an annual maintenance charge of \$600. METAPOL links law enforcement executives and others concerned with the diverse issues facing today's progressive agencies.

Using a personal computer, a modem, and a toll-free "800" number, law enforcement executives and their staff can participate in a variety of topical conferences, including one on community policing. For more information, call Dan Stern at (202) 466-7820.



## QUESTIONS AND ANSWERS

ANSWERS TO QUESTIONS FROM JUDICIARY COMMITTEE MEMBERS  
BY JO ANN HARRIS,  
NOMINEE FOR ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION

QUESTIONS FROM SENATOR PRESSLERRural Crime

1. What would you do, as head of the Justice Department's Criminal Division, to insure that rural areas get their fair share of federal resources to fight crime?

I was raised in a rural area, and am very sensitive to the problem of rural crime. If confirmed, I would like to work with the Committee to ensure that federal resources are apportioned fairly to rural areas.

I also will take care to ensure that the Criminal Division provides small U.S. Attorney's offices serving rural areas with the help they need -- for example, through joint investigations and training programs. Indeed, an important function of the Division is to assist U.S. Attorney's offices that may not have the manpower or technical expertise to respond effectively to local problems.

2. What are your views of the effectiveness of rural drug task forces in combatting illegal drug activity?

Task forces can be effective mechanisms for pooling the resources and talents of federal, state and local law enforcement, and for securing the cooperation necessary in the fight against illegal drugs. Once established, task forces can be augmented on a case-by-case basis to respond to emerging problems, such as the localized distribution of a specific controlled substance like methcathinone ("CAT").

Law Enforcement

1. Will you work to ensure greater sensitivity to tribal law enforcement concerns.

Yes, I am sensitive to this problem, and will work to ensure sensitivity on the part of the Division.

**2. If so, what specific steps can we take to ensure that there is a clear line of communication between Federal law enforcement and Indian Country residents?**

It is essential to establish better lines of communication through more frequent personal interactions between federal law enforcement personnel, tribal officials, and community members. Federal prosecutors and investigators must be encouraged to get out of their offices and into the community, not only to investigate case-related matters, but also to meet regularly with community representatives about their law enforcement concerns. Victim-Witness and Law Enforcement Coordinating Committee Coordinators can play an important role in serving as direct channels for this communication. They should be encouraged to maintain and increase their activities with tribal leaders and community members.

Another important step, already taken by some United States Attorneys' offices, is to establish multi-disciplinary teams for investigations and prosecutions. The teams are composed of Assistant United States Attorneys, FBI agents, BIA and Tribal investigators, health professionals, social workers, and other appropriate officials. Participation in such teams is an important method of sensitizing federal prosecutors and investigators to cultural and community concerns, and of giving them a greater appreciation of their role in the community.

**Carjacking**

**1. What steps will you take to adequately enforce the Anti-Car Theft Act?**

The Act directed the Department to work cooperatively with state and local officials to investigate armed carjackings and to prosecute violators where appropriate. If confirmed, I will ensure that local U.S. Attorneys Offices and the FBI continue to work cooperatively with state and local law enforcement to investigate and prosecute such cases. FBI task forces operating under the Safe Streets initiative, as well as Triggerlock task forces, are particularly appropriate vehicles to ensure effective cooperation at all levels.

**2. Will enforcement be a priority for you?**

Attacking the problem of violent crime is a priority of the Department, and the availability of the federal carjacking statute provides federal law enforcement with an

important weapon in that battle. If confirmed, I will work with local law enforcement to ensure that this crime is attacked in the most effective way possible.

#### Drug Law Enforcement

**1. Do you support maintaining the federal sentencing guidelines?**

I support the sentencing guidelines' principles of truth-in-sentencing and uniform treatment for similarly-situated offenders. Part of the guidelines process, of course, is a continuing review of the appropriateness of specific guidelines and policies -- a review which is regularly conducted by both the Department of Justice and the Sentencing Commission.

**2. What impact do you feel Congress' passage of mandatory minimum sentences has had on the administration of justice?**

Mandatory minimums for serious offenses have had a salutary effect on the administration of justice to the extent that they have ensured certain punishment of the truly dangerous, and proved a deterrent to others. Of course, as with any system which endeavors to obtain the benefits of nation-wide uniformity, there may be instances of unfairness in individual cases, as well as in certain subclasses of cases. One objective of the reviews mentioned above is to determine whether such cases can be identified and to make modifications if appropriate.

#### Forfeiture Laws

**1. Do you support maintaining current criminal and civil federal forfeiture laws?**

I support the forfeiture laws, which play an important role in removing the profit incentive for criminal activity, and in enabling prosecutors to cripple criminal organizations. In light of last Term's Supreme Court decisions, as well as allegations about the manner in which the laws have been enforced, a review of prosecution policies may be in order to ensure that the laws are being applied fairly and as Congress intended.



2. Do you have any thoughts on how the proceeds of asset forfeitures should be allocated and used in fighting crime?

I do not yet have a view on this subject, but look forward to working with the Committee and other experts in this area.

#### QUESTIONS FROM SENATOR GRASSLEY

##### Costs of Imprisonment

If you are confirmed, would the Criminal Division support legislation that would clarify that federal judges could impose the costs of imprisonment as part of the criminal fine?

I support the imposition of such costs in appropriate cases pursuant to U.S. Sentencing Guideline 5E1.2(i). If clarifying legislation were necessary, I would be happy to work with the Congress.

##### Public Integrity

The Public Integrity Section is within the Criminal Division. What steps will you take to ensure that political considerations do not affect prosecutorial decisions in these investigations?

It is absolutely essential to public confidence in the administration of justice that political considerations play no role whatsoever in prosecutorial decision-making. If confirmed, I intend to make my views on this clear to all of our prosecutors. In addition, I intend to enforce rigorously the rules adopted by the Attorney General, which restrict contacts by both the White House and the Congress with the Criminal Division on pending investigations and cases. The goal of these rules is to ensure that the administration of justice is free of political considerations and that it is correctly perceived to be totally professional and apolitical.

##### United States Attorneys

If confirmed, how will you decide which prosecutions should be handled by Criminal Division personnel in Washington and which should be undertaken by the local United States Attorneys?

If confirmed, I will work cooperatively with the U.S. Attorneys to ensure that federal resources are brought to

bear most effectively in the fight against crime. Sometimes this means that cases should be prosecuted by Criminal Division personnel, sometimes by local U.S. Attorney's offices, and sometimes by joint task forces. The U.S. Attorneys are, of course, on the front lines of the battle against crime. The Criminal Division helps set national priorities, and provides resources for prosecutions which cannot be handled effectively by local U.S. Attorneys offices. Certain categories of cases, particularly those in which the U.S. Attorney must be recused because of conflicts, those which involve multi-district problems, and those of truly national significance often require Criminal Division involvement. Overall, the decision regarding which personnel should handle which prosecutions will depend on a cooperative judgment as to the most efficient allocation of federal prosecutorial resources.

#### Defense Procurement Fraud Unit

The answers to the following questions were provided by the Criminal Division:

Please provide data concerning:

(a) The nature and number of investigations, indictments, prosecutions, and related proceedings conducted by the Defense Procurement Fraud Unit in the past three years.

Over the past three years, the Unit has conducted investigations of the following nature: defective testing, product substitution and defective pricing allegations, as well as traditional kickback and bribery offenses. The Unit also has focused on frauds involving contracts for products and services financed under the Foreign Military Sales (FMS) and Foreign Military Financing (FMF) Programs.

Over the past three years, the Unit has conducted approximately 42 investigations, a number of which involved multiple targets. (This figure does not include CIA referrals or those voluntary disclosure cases that were examined but not actively investigated by the Unit. This figure also does not include case reviews and evaluations which were performed for the United States Attorneys' Offices.) During this same period, the Unit obtained 10 indictments and filed 14 informations. In addition, in November 1992, a Unit prosecutor tried a criminal defective pricing case which was based on an indictment obtained by a United States Attorney's Office.

In addition to these investigations and prosecutions, the Unit staff has devoted substantial time to providing

guidance and assistance to United States Attorneys' Offices in procurement fraud cases where expertise is needed, or the existing commitments of those offices limit their ability to handle complex and lengthy cases. Additionally, the Unit has played a major role in the Department of Defense's Voluntary Disclosure Program, serving as the program contact point for the entire Department in reviewing disclosure investigations in the program.

(b) The number of matters described in paragraph (a) which are inactive but have not been closed or declined and the number of unaddressed referrals which allege criminal misconduct involving offenses described in paragraph (a).

The Unit has no inactive investigations and no unaddressed referrals. There are 5 completed investigations in which declination recommendations are pending.

(c) The nature and number of matters described in paragraph (a) which have been closed, settled, or litigated to conclusion.

Approximately 26 investigations have been closed or declined. Of the 24 indictments and informations brought by the Unit, all have been resolved by plea or litigated to conclusion with the exception of one matter that is pending trial. In addition, three former executives of Bicoastal Corporation's Link Flight Simulation Division face sentencing on November 4, 1993, in a major defective pricing case which was indicted by the Unit in July 1992.

(d) The results achieved, including convictions and pre-trial diversions, fines and penalties levied, restitution assessed and collected, and damages recovered, in such matters.

There have been 27 convictions and 11 acquittals; \$4,416,500 in criminal fines, \$62,500 in forfeitures, \$2,626,000 in restitution and \$67,670,000 in civil penalties. In addition, as a part of a plea agreement, one company agreed to withdraw \$39.3 million in claims against the government.

Unit records indicate that criminal fines, forfeitures, and restitution payments in the amount of at least \$5,961,000 have been paid to date. In addition, another \$56,030,000 in civil penalties have also been collected.



RESPONSES OF EDUARDO GONZALEZ - NOMINEE  
DIRECTOR, U.S. MARSHALS SERVICE  
SENATE JUDICIARY COMMITTEE HEARING  
OCTOBER 14, 1993

Responses to the Questions of Senator Larry Pressler

FEDERAL WITNESS SECURITY PROGRAM

**Question:** Can you explain what changes in the program were made to force witnesses to repay their debts acquired before they entered the program?

**Answer:** Legislation passed in 1984, as part of the Comprehensive Crime Control Act, (18 USC 3521) requires all individuals entering the Witness Security Program to "make a sworn statement of all outstanding legal obligations..." and to agree to "comply with all legal obligations and civil judgements..." Furthermore, 18 USC 3523 specifically addresses civil judgements and provides legal remedies for individuals to ensure that Program participants comply with legal obligations whether they were incurred prior to or during their pendency in the Program.

Program participants are informed of these requirements during our initial contact with the witness - Preliminary Interview and again during the completion of the Memorandum of Understanding, that the participant and all adult family members must execute.

Should a Program participant refuse to comply with requests to repay the debt, the U.S. Marshals Service notifies the Department of Justice in writing. The Department may elect to disclose the witness's new name and relocation area to creditor. This procedure is very seldom necessary since Program participants usually begin repayment of the debt after notification by our Agency that failure to comply will result in termination of services as well as disclosure.

**Question:** Do you know if witnesses are provided with false credit histories? If so, what protections are given to innocent insurers, creditors or other professionals who rely upon this false financial information?

**Answer:** The United States Marshals Service advises all prospective Program participants at the time of the Preliminary Interview and again during the execution of the Memorandum of Understanding that they will not be provided with credit or credit histories. The basic foundation of the Program's security revolves around the legal change of identity.

Program participants are briefed and assisted in procedures designed to help them establish credit under their new identity. These measures are not intended to defraud but to help the witnesses and their families reestablish minimum necessary references required to comply with basic residency demands.

#### NATIONAL ASSET SEIZURE AND FORFEITURE PROGRAM

**Question:** What plans do you have to change or expand the National Asset Seizure and Forfeiture Program Administered by the U. S. Marshals Service?

**Answer:** The custody and disposition role in the federal asset forfeiture program presents one of the most complex management challenges in the U.S. Marshals Service. In FY 1993, the U.S. Marshals took custody of almost 39,000 properties seized for forfeiture by eight different federal law enforcement agencies. Over 27,000 properties valued at \$1.9 billion are in the seized asset inventory today. The proper management of this program is critical to not only the success of the forfeiture program but I also consider it a matter of public trust.

While I have not had the opportunity to personally review the Marshals Service seized asset program, there are several management and policy areas that I will review very closely:

- o **Personnel:** The Marshals Service's resources have not kept pace with the explosive growth of the seized asset program. The current fiscal restrictions require the optimum utilization of personnel currently on board. I will work to ensure that experienced Deputy U.S. Marshals in the seized asset program are utilized properly and are relieved to the greatest extent possible from administrative support functions.

To ensure the highest level of expertise in the seized asset program, I will review how, within current budget restrictions, to reduce personnel turnover in the program. In addition, I hope that recruitment of personnel with business and accounting expertise for program will be possible.

o Automation: The successful integration of the Marshals Service seized asset management information system into the Department of Justice Consolidated Asset Tracking System (CATS), will be a high priority. While the timetable for CATS implementation is beyond the control of the Marshals Service, I will ensure the continued strong support of this project.

o Preseizure planning: My law enforcement experience has taught me that good preseizure planning is critical to making sound financial and managerial decisions regarding the targeted property. The lack of good coordination and planning among the various components, has resulted in poor seizure decisions. I strongly support the change in Departmental policy which would make coordinated preseizure planning with the local U.S. Marshal mandatory in most cases.

#### INDIAN RESERVATIONS

**Question:** What kind of interaction does the Marshals Service have with the Indian reservations?

**Answer:** A number of U.S. Marshals Service districts have large Native American populations. Marshals Service personnel, often in conjunction with tribal police and the Bureau of Indian Affairs (BIA), serve process and execute arrest warrants on the reservations. Each reservation is different, thus Marshals Service districts have varying degrees of interaction with the reservations within their jurisdiction.

o District of South Dakota - there are eight reservations. The Marshals Office in South Dakota works very closely with the BIA and tribal police, and there currently are no lingering concerns in this district.

o District of Montana - six of the seven reservations in the district are under the umbrella of the BIA. All felonies committed on the reservations are adjudicated in federal court. BIA police work with Marshals Service personnel in the execution of warrants and the service of process for such cases.



o District of Nevada - the greatest interaction with Native American reservations is in the Reno area; in the Las Vegas area, tribal police handle all criminal matters. Since 1979, the District has been involved in a treaty dispute over land use rights with some members of the Shoshone tribe.

o Northern District of New York - there are three reservations and the interaction is minimal. In 1986, a tribal conflict over a Bingo hall on the Oneida reservation resulted in Marshals Service personnel, after negotiation with tribal leaders, going in to inspect the location where the games were held. Several arrest warrants were issued -- five tribal members were tried and convicted in federal court. The Onondaga reservation in the district served as a hideout for a federal fugitive for six years. Although federal agents knew his whereabouts, he could not be arrested because of tribal sovereignty. The fugitive eventually surrendered.

Although there are some areas where the situation can be tenuous at times, the Marshals Service, generally, has a good relationship with reservation leaders and tribal police. Many of the districts have frequent contact with the members of the Native American reservations; other districts have only minimal contact.

**Question:** Do you foresee any changes in the role of the Service in this respect? If so, please explain.

Upon my confirmation and appointment, I intend to meet with officials from the Department of the Interior to discuss the role of the U.S. Marshals Service in this regard. I will advise you at that time, if there are any future changes being considered.

#### Response to the Question of Senator Paul Simon

**Question:** I would like to obtain from you once you are confirmed a full accounting of all supervisory reports on the Chicago Marshals office; what steps have been taken to remedy identified problems; and what steps you will take to address any remaining problems that have not been remedied to your satisfaction?

**Answer:** Upon my confirmation and appointment, I will certainly advise you on any action pending, and provide you with any requested information with regards to the Marshals office in the Northern District of Illinois.









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